Supreme Court, U.S.
FILED
2006
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No. 05-1599

In The
Supreme Court of the United States

JONAS EKLUND, et al.,

Petitioners,

v.

BYRON UNION SCHOOL DISTRICT, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In the context of a public school seventh grade class, impressionable twelve-year-old students were "to become Muslims" for three weeks, wore Muslim identification tags that displayed their new Islamic name and the Star and Crescent Moon, were handed materials that contained unqualified affirmations of Islamic belief, including "***Remember Allah always so that you may prosper***," and performed portions of Islamic religious practices, including fasting, charity, memorizing and reciting parts of the Fatiha prayer, and displaying the Islamic religious statement, "In the name of God, the Merciful, the Compassionate," on banners that were hung on the classroom walls.

The district court found no Establishment Clause, Free Exercise Clause, or parental rights violation. The Ninth Circuit affirmed. The questions presented are as follows:

1. Whether the Establishment Clause is violated when a public elementary school has students adopt the persona of a member of a religion and act out religious activities and practices under the guise of cultural education.

2. Whether an "opt out" provision may negate the coercion element of a Free Exercise or parental rights violation in the public school context when the parents are unaware of both the "opt out" right and the objectionable religious instruction.

RULE 14.1(b) STATEMENT

Petitioners are Jonas Eklund and Tiffany Eklund and their minor children, Chase Eklund and Samantha Eklund.[1]

Respondents are the Byron Union School District; Thomas Meyer, Superintendent of the Byron Union School District, sued in his official capacity; Nancie Castro, Principal of the Byron/Excelsior public school, sued in her personal and official capacities; Brooke Carlin, a teacher at the Byron/Excelsior public school, sued in her personal and official capacities; and Michele Carr, a teacher at the Byron/Excelsior public school, sued in her personal and official capacities.

RULE 29.6 STATEMENT

Petitioners are individuals and have no parent companies or non-wholly owned subsidiaries.

[1] Heather Mathisen and her minor daughters, Morgan DuPee and Taylor DuPee, were plaintiffs in the action below, but are not petitioners to this petition.

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ABBREVIATIONS KEY

App.	Refers to the appendix to this petition for a writ of certiorari.
DuPees	Refers to Heather Mathisen and her daughters, Morgan and Taylor DuPee, plaintiffs in the action below, but who are not petitioners to this petition.
Eklunds	Refers to Jonas, Tiffany, Chase, and Samantha Eklund, plaintiffs in the action below and petitioners to this petition.
ER.	Refers to the excerpts of record in the Ninth Circuit appeal of this action.
L.	Refers to petitioners' "lodging" with this Court of a few selected pages of a 120-page district court exhibit in 8½ x 11 format, cited herein as "L. [page number]." Reducing the size of the selected pages to include them in the appendix to this petition for a writ of certiorari would have rendered the pages illegible.
School District	Refers to the Byron Union School District.

PETITION FOR A WRIT OF CERTIORARI

DECISIONS BELOW

The Ninth Circuit's memorandum decision appears at App. 1. The district court's order on petitioners' Establishment Clause claim appears at App. 4. The district court's order on Chase Eklund's Free Exercise claim and Jonas and Tiffany Eklund's parental rights claim appears at App. 45. The district court's order on Samantha Eklund's Free Exercise claim appears at App. 43, and the district court's order on the DuPees' standing appears at App. 34.

JURISDICTION

The Ninth Circuit issued its memorandum decision on November 17, 2005. (App. 1, 3.) The Ninth Circuit denied a timely petition for rehearing and rehearing en banc on February 1, 2006. (App. 61.) On April 3, 2006, this Court granted petitioners an extension of time until June 1, 2006, to file this petition. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

"Congress shall make no law respecting an establishment of religion, or prohibiting the Free Exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

STATEMENT

Parents entrust public schools with educating their children, not indoctrinating them in religion. Yet, the public school here had children *become Muslims* for three weeks.

A. *The 2001-2002 School Year – Chase Eklund and Teacher Brooke Carlin.* For three consecutive weeks during the first semester of the 2001-2002 school year, respondent Brooke Carlin taught a unit entitled "The Roots of Islam and the Empire" ("Islam unit") as part of her seventh grade World History class at the School District's Excelsior School. (ER.988, 2181-82.) The Islam unit included the use and implementation of materials entitled "Islam: A simulation of Islamic history and culture" ("Islam Simulation materials"). (L.1; ER.1920-2040.) Petitioner Chase Eklund was a student in one of the six sections of the World History class that Carlin taught that year.[2] (ER.2052, 2270-71, 2352.)

Before the start of the 2001 Fall semester, Chase and his parents were not informed of, nor aware of, any School District policy that would have allowed Chase to have

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[2] The California educational guidelines do not require the use of the Islam Simulation materials, but School District policy allows their use. (ER.422, 676-78, 2420.) To teach this unit, the State approved the use of the *Across the Centuries* textbook, which Carlin used briefly. (ER.667, 674, 679, 693, 702-03, 2063-64, 2080.)

The teacher's edition of *Across the Centuries* warned Carlin that "Recreating religious practices or ceremonies through role playing activities should not take place in a public school classroom. . . . Role playing religious practices may also violate the conscience of students who are asked to participate." (ER.971.)

Excelsior teachers received no specific training on what is appropriate regarding the teaching of religion in public school. (ER.664.)

"opted out" of the World History class. (ER.170 ¶ 3; 645 ¶ 2; 649 ¶ 2.) Moreover, school officials did not provide parents with advanced notice explaining the use and purpose of the Islam Simulation materials, nor did school officials seek parental consent before exposing the students to the materials. (ER.170 ¶ 2; 645 ¶ 2; 649 ¶ 2.) The Eklunds *first* learned about the School District's "opt out" policy after receiving notice about the policy from the Excelsior School before the start of the 2002-2003 school year, the *year after* Chase had attended the three-week Islam unit. (ER.645 ¶ 3; 649 ¶ 3.)

School District policy, in effect at all times relevant here, set an instructional goal for teachers to help each student develop moral, ethical, *and spiritual* values. (ER.964.) Teachers were required to comply with School District policies. (ER.683, 699-700.)

A.1. ***The Islam Simulation Materials.*** The Islam Simulation materials are published by Interaction Publishers and were revised with input from the Islamic Education and Information Center and the Council of Islamic Education. (ER.1921.)

The Islam Simulation materials contain numerous affirmations of Islamic faith, sometimes even denominated in bold print as "**Truth**" and "**Fact**." For example, students were told that "The Holy Qur'an is God's word as revealed to Prophet Muhammad through the Archangel Gabriel. **Truth**." (L.10; original emphasis), and "The Qur'an . . . is God's third revelation that was revealed to

Prophet Muhammad. **Fact.**" (ER.1960, 1968; original emphasis.)[3]

At the start of the three-week Islam unit, Carlin handed the seventh grade students the "Student Guide" from the Islam Simulation materials, which told the students that "From the beginning [of the unit] *you and your classmates will become Muslims.*" (L.2 ¶ 2; ER.1934 ¶ 2; 2299.)

Carlin told the students that they would be graded on their participation and that trying their hardest would improve their grade. (ER.2185-86, 2279-80, 2289.) Students were graded by completing the simulation and by filling out a "Caravan Log." Carlin used this log to keep track of whether the students were completing the "Islamic Five Pillars of Faith" and to tally the number of "Dirhams" or Arabic money the students earned by playing a dice game. (ER.1959, 2164-65, 2278-80, 2303-05, 2316, 2319.)

Each "Dirham" given the students displays (1) a Star and Crescent Moon, which the Islam Simulation materials explain is the symbol of Muslims, and (2) "In the name of God, the Merciful, the Compassionate," which is the "Bismillah," the opening words of the Qur'an. (L.6; ER.1943, 1966, 2004.)

Carlin placed students into groups named after early Islamic cities, and students took roles within each group. (ER.1927, 1959, 2182-83, 2277, 2283-85, 2370.) Chase was placed into the "Jerusalem" group. (ER.2061-62, 2099.)

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[3] Unless otherwise noted, all emphasis herein is added.

Carlin then gave the students a list of "Islamic Names" from which the students selected an Islamic name; Chase took the name "Affat." (L.4; ER.1936, 2061, 2183, 2285, 2300-02, 2369.) Taking a new name is a common practice among Wester converts to Islam, for example, Muhammad Ali (Cassius Clay). (ER.869, 930.) Students referred to each other by their Islamic names both inside and outside of class. (ER.2098-99, 2198-99.)

A.2. ***Muslim Identification Tags.*** Carlin also gave the seventh grade students "I.D." or identification tags (about 4" x 6" in size) on which the students wrote their new Islamic names and cities. (L.4; ER.1936-37, 2196, 2276, 2353-54.) The identification tags displayed the Star and Crescent Moon. (L.4; ER.1937, 1966.)

Carlin showed the students how to make their Muslim identification tags, which included a string so the students could wear their tags around their necks during class. (ER.2196.)

Chase wore his Muslim identification tag around his neck each class day to obtain points toward his grade. (ER.979, 2098, 2143 ¶ 2.) Other students wore their identification tags as well. (ER.2098, 2154, 2197.)

A.3. ***Memorizing and Reciting the Fatiha Prayer.*** Carlin gave the students pages from the Islam Simulation materials that included the "Fatiha," the opening chapter in the Qur'an, which Muslims recite at every daily prayer. (L.5; ER.1942.) The Fatiha has a status among Muslims akin to the Lord's Prayer among Christians. (ER.932.) Carlin read the Fatiha prayer out loud to the students. (ER.2207-08, 2356-57.)

Carlin required Chase and his "Jerusalem" group to memorize part of the Fatiha so they would have the prayer "in the back of [their] head"; if they wanted to, the students could have memorized the entire Fatiha. (ER.2114-18, 2131-35.) *If everyone in the group memorized a part of the prayer and recited it to Carlin, the group received Dirhams.* (ER.2133-34.)

The students in Chase's group memorized the first part of the Fatiha, "In the name of God, Most Gracious, Most Merciful. Praise be to God." (ER.2132-34.) Carlin required the students in Chase's group to recite their memorized part of the Fatiha to her. (ER.2133-35.) As the students left the classroom, Carlin stood by the door and each student recited to Carlin "In the name of God, Most Gracious, Most Merciful. Praise be to God." (ER.2134-35.) Carlin did not explain to the students that the Fatiha, of which she required them to memorize and recite, was only an example of a prayer a Muslim would say. (ER.2214-16.)

A.4. *Affirmations of Islamic Faith.* During the three-week Islam unit, Carlin also gave the seventh grade students a handout from the Islam Simulation materials entitled "Islam: A History." (L.7-9; ER.1944-48.) Carlin did not review the handout with the students and just gave them the pages to read on their own. (ER.2111.)

The Star and Crescent Moon appears on the top of each page, along with such statements in *oversized print* as: "In the name of Allah" and "Allah . . . submission to God." (L.7-8; ER.1944-48.)

The pages also include such unqualified affirmations of Islamic faith as "*Before God revealed His message to Prophet Muhammad,* the Arabs worshiped many Gods." (L.7 ¶ 4; ER.1944), and "*Angel Gabriel directs Prophet*

Muhammad," (L.8 ¶ 2; ER.1945), and "While meditating in a cave in the desert, [Muhammad] *had a vision of an angel*," (L.8 ¶ 2; ER.1945), and "[Muhammad] *was told by the angel Gabriel to be the apostle of God* and to 'warn' the people," (L.8 ¶ 2; ER.1945), and "*God's revelations were written down* over a period of 23 years which *today constitutes the Qur'an*, the holy book of Muslims." (L.8 ¶ 2; ER.936, 1945.)

A.5. *The Five Pillars of Faith.* Carlin also gave the students a handout from the Islam Simulation materials entitled the "Five Pillars of Faith," which another handout from the materials explained to the students were the "five important duties of a faithful Muslim" and were "[c]entral to being a faithful Muslim." (L.9, 12; ER.1946, 2004, 2383, 2359.)

The handout told the students that they "*must complete* the Muslim's Five Pillars of Faith." (L.12 ¶ 1; ER.2004.)

Carlin kept track of whether students completed the Five Pillars of Faith through the "Caravan Log," which students filled out daily. (ER.1959, 2089-90, 2210-11.)

A.5.a. *The Shahada Banner.* For the First Pillar of Faith, the Shahada or profession of faith, the handout told the students to demonstrate their understanding of this "aspect of Islamic faith" by completing a city banner that includes the opening words of the Qur'an, known as the Bismillah ("In the name of God, the Merciful, the Compassionate"). (L.12; ER.2004.)

The Shahada banners were about three-feet by five-feet in size and were made of white butcher-block paper. (ER.2212.) On the banners, students wrote their Islamic

names, their Islamic group name or city, and the Arabic proverbs they had to memorize. (ER.2112-13, 2130, 2156-57, 2184, 2200-01, 2218-19, 2376.)

Most of the students in Chase's class section, including Chase's "Jerusalem" group, wrote "Bismillah" on their banner, as the handout instructed them to do. (ER.2004, 2131.) The students knew Bismillah meant "In the name of Allah, the Compassionate, the Merciful." (ER.2004, 2286-87.) Some groups even wrote on their banners the English translation of "Bismillah": "In the name of God, the Merciful, the Compassionate." (ER.2214-15.)

The students displayed the completed banners on the classroom walls during the three-week Islam unit. (ER.2143 ¶ 2.)

A.5.b. ***Proverbs and Verses from the Qur'an.*** To complete the Second Pillar of Faith, the Salaat or prayer, Carlin had the seventh grade students memorize Arabic proverbs and part of a verse from the Qur'an. (L.12; ER.2113, 2127, 2306-09, 2328-29, 2333.) According to the proverb sheet given the students, "While many sayings and proverbs are dated well before the time of Islam, *Prophet Muhammad himself has been credited with tens of thousands.*" (ER.2006.) The students were free to memorize any of the proverbs on the sheet, including "*God preserve us from the saying of I.*" (ER.2006, 2220-21.) Carlin had the students recite their memorized proverb to her. (ER.2221.)

Along with memorizing proverbs, Carlin had the students memorize as a group one verse from the Qur'an; these verses were provided to the students on handouts from the Islam Simulation materials. (L.14; ER.2007-08, 2377-78.) Carlin gave the students *bonus points* for memorizing the

verses from the Qur'an. (ER.2308-09.) The students recited the verses of the Qur'an they had memorized. (ER.2378.) Carlin also had students read aloud verses from the Qur'an, and the students were supposed to be quiet and listen to the reading of the verses. (ER.2007-08, 2222-24.) The handout also included the bold, italicized Islamic declaration: "***Remember Allah always so that you may prosper***." (L.14; ER.2008; original emphasis.)

A.5.c. ***Fasting and Acts of Self-Denial.*** To complete the Third Pillar of Faith, Ramadan or fasting, the instruction sheet Carlin gave the seventh grade students informed them that "[s]ince the *principal act of devotion* during this holy month is *fasting*, each group *should* give up one lunch or snack period to work on their Festival Presentation"; as options, the sheet instructed the students that they could give up one snack and/or television or radio program at home. (L.12; ER.2004, 2329-30.)

Through fasting a Muslim learns self-restraint, (ER.935), and through self-denial a Muslim surrenders himself to God. (ER.1894.) As noted above, during the Islam unit, the students were to "be[come] Muslims." (L.2 ¶ 2; ER.1934 ¶ 2.)

To satisfy this Third Pillar of Faith, some students denied themselves of such things as watching television or eating candy for five days, which were Carlin's suggestions. (ER.2157, 2159.) Other students denied themselves of their recess period. (ER.2118-19.) One student stopped drinking soda for five days because she had been drinking a lot of it, and, therefore, she thought that would be something "challenging" to give up so she could see how Muslims "give up things" during Ramadan and to see what

it would be like to be a Muslim during Ramadan. (ER.2157-58.)

For *extra credit*, Carlin said the students could *fast* and give up their *lunch*, and *one of the students in Chase's class did so*. (L.12; ER.2119-20.)

A.5.d. ***Acts of Charity.*** With regard to the Fourth Pillar of Faith, Zakaat or charity or almsgiving, Carlin had the students do some form of "charity" because Muslims do "charity" to fulfill this Fourth Pillar of Faith, and the students received points toward their grade for doing their acts of charity. (L.12; ER.2330-31, 2360-64, 2375-76.) The students had to have their acts of charity verified by the person to whom they performed the charity, and the students had to complete a "Zakaat Verification Form." (L.13; ER.2005, 2360-61, 2364.)

The Zakaat Verification Form is explicit about requiring a religious observance of the student, since it instructs them that "*Although the giving of zakaat is a personal act of faith between the giver and God for which verification is not required*, this form is used *only* as a part of the group interaction process." (L.13; ER.2005.)

These completed Zakaat Verification Forms were given to Carlin who graded them and gave the students points for the charity they had performed. (ER.2225.)

In completing this Pillar of Faith, one student, for example, helped a teacher grade papers and helped deliver flyers for the front office of the school. (ER.2160.) Chase's "Jerusalem" group picked up trash on the school campus. (ER.2120-22.) Students did these charitable acts, as one student explained, because Muslims "have to give charity

and they have to do this to fulfill their religion." (ER.2161).

A.5.e. ***Pilgrimage to Makkah.*** With regard to the Fifth Pillar of Faith, the Hajj or pilgrimage to Makkah, the seventh grade students played a "Race to Makkah" game. (L.12; ER.2004.) The "Race to Makkah" game was a dice game, which the students called the "Jihad" dice game. Carlin kept track of each group's progress by moving camel pieces (each group was represented by a camel piece) on a wall map that ended at Makkah. (ER.2081-85, 2127, 1992.) Students would roll the dice and, depending on the number rolled, draw a "Wisdom Card," "Quiz Card," or "Bulletin Card." The student would hand the card to Carlin, who would read it aloud to the group for the students to answer. (ER.1960-90, 2086-87, 2128, 2229.)

"Wisdom Cards" include affirmations of Islamic faith with no qualifying language such as: "The Holy Qur'an is God's word as revealed to Prophet Muhammad through the Archangel Gabriel. **Truth**," (L.10; original emphasis), and "Archangel Gabriel came to Prophet Muhammad while he meditated in a cave and revealed God's word to him. Revelations continued for 23 years. **Truth**," and "The Qur'an . . . is God's third revelation that was revealed to Prophet Muhammad. **Fact**." (ER.936, 1960, 1970, 1968; original emphasis.)

"Quiz Cards" also included affirmations of Islamic faith with no qualifying language such as "The Qur'an is a). quotes by caliphs, b). Islamic tradition, c). a history of Islam, d). *God's word spoken through Prophet Muhammad* [answer: d]," and "A phrase believers recite to become a Muslim: _____ [answer: "There is no God but Allah, and Muhammad is his prophet."]." (L.11 nos. 77-78), and

"Complete this phrase: *Allah is the only true God and Muhammad is his* _____ [answer: prophet]." (ER.936; 1972 no.4; 1981 nos.75, 77, 78; 1957.)

Once Carlin read the cards to the students, she gave the cards to the group. (ER.2231-32.) Carlin did not explain the cards to the students, except a couple of times. (ER.2096-98.) Carlin would then have a student read the card to the other students in the group; students kept possession of the cards and were free to read them on their own when Carlin was not present. (ER.2233-38, 2381-82.)

A.6. *Dressing as Muslims.* Carlin gave the students *extra credit* if they dressed as Muslims. As Chase testified, the student's dress "had to be *Islamic*" to qualify for the extra credit. (ER.2107-08, 2129, 2371.)

Chase did not dress up as a Muslim: "I did not dress up because I thought it was wrong against my culture, because I'm used to Jesus, because I'm Christian. And I didn't think Muslim – that, you know, that Muhammad or whatever their God is, I didn't think it was right. I felt it was wrong to dress up for another culture that I wasn't used to." (ER.2107.)

Moreover, owing to his participation in the Islam unit, Chase felt "weird" (the word of a seventh grader) because the students were "*practicing*" Islam and actually "*doing it*," and he thought his rights were being violated. (ER.2044-46.)

The only simulation in the seventh grade with regard to the study of religion was in the Islam unit; it was also

the only unit in which the students acted out religious practices.[4] (ER.2243-44, 2248-49.)

B. *The 2002-2003 School Year – Samantha Eklund and Teacher Michele Carr.* Petitioner Samantha Eklund was enrolled in respondent Michele Carr's seventh grade class at the Excelsior School during the 2002-2003 school year, the year after her brother Chase had attended the class.[5] (ER.2449 ¶ 1.) Now that her parents knew about the Islam unit and about the "opt out" provision, they opted Samantha out of the unit. (ER.159; 170 ¶ 5; 174 ¶ 2; 640 ¶ 5; 645 ¶ 3; 649 ¶ 3; 2407-14, 2423, 2426, 2430-31, 2434.)

During the "opt out," Samantha was required to report to the school office or Brooke Carlin's eighth grade classroom for more than one month. (ER.174 ¶ 3; 2439, 2449 ¶ 3.) During that time, which was often three full class periods a day, Samantha worked on school assignments without instruction or guidance from her teacher, Carr. (ER.174-75 ¶¶ 3-4; 641 ¶ 6; 2258-59, 2440-45, 2449-50 ¶¶ 3-4.)

Carr had Samantha study on her own an entire chapter on the French Revolution; Samantha was given a test, which she failed. (ER.174 ¶ 3; 641 ¶ 7; 2449 ¶ 3.) Students who attended the Islam unit did not have to study the French Revolution chapter on their own, nor take a test on it. (ER.174 ¶ 3; 641 ¶ 7; 2449 ¶ 3.)

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[4] Carlin also had students color prayer rug designs on paper, cut them out, and turn them in for points toward their grade. (ER.1905-06, 2105-08, 2124-25, 2025.)

[5] During the 2002-2003 school year, respondent Brooke Carlin taught eighth grade and not seventh grade. (ER.2342.)

During the "opt out," Samantha was separated from her fellow students and friends, and she felt that she was being singled out because of her religious beliefs. (ER.175 ¶ 5; 2450 ¶ 5.)

C. *The Decisions Below.* Petitioners sued respondents, pursuant to 42 U.S.C. § 1983, for a declaratory judgment, a permanent injunction, and nominal damages to redress the deprivation of their rights as a result of the teaching of Islam in the Excelsior public school. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. Petitioners raised an Establishment Clause claim, as to all petitioners, Free Exercise Clause claims, as to Chase and Samantha Eklund, and a parental rights claim, as to Jonas and Tiffany Eklund.[6]

The district court dismissed Chase Eklund's Free Exercise claim and Jonas and Tiffany Eklund's parental rights claim. (App. 45.) The district court found that Chase suffered no coercion owing to the existence of the "opt out" policy, even though respondents did not inform Chase or his parents about the "opt out" policy until *after* Chase had completed the Islam unit. (App. 52-54.) The court dismissed the parental rights claim in part by ruling that the Eklund parents were not entitled to advanced notice about the use of the Islam Simulation materials before Chase had begun the unit, notice that would have permitted the

[6] The district court dismissed the DuPees as plaintiffs for lack of standing. (App. 34.)

Eklunds to have inquired further into the unit and learn about the "opt out" provision.[7] (App. 58-59.)

The district court entered a separate order, on cross-motions for summary judgment, dismissing the Eklunds' Establishment Clause claim for nominal damages.[8] (App. 4.) The district court found no coercion of an "overt religious practice" and no endorsement of Islam. (App. 16-25.) The court also determined that the individually sued respondents were entitled to qualified immunity. (App. 30-31.)

On appeal, the Ninth Circuit's jurisdiction was based on 28 U.S.C. § 1291. The Ninth Circuit entered a memorandum decision upholding the district court's ruling on the Establishment Clause issue, the qualified immunity issue, and the DuPees' standing issue. (App. 1-2.) With regard to the Establishment Clause issue, the Ninth Circuit ruled that the "Islam program activities were not 'overt religious exercises' that raise Establishment Clause concerns." (*Id.*) The Ninth Circuit did not discuss the Free Exercise and parental rights issue. (*Id.*)

Petitioners filed a petition for rehearing and rehearing en banc and argued, among other things, that the Ninth Circuit had failed to address – and should address –

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[7] The district court later dismissed Samantha Eklund's Free Exercise claim since she had "opted out" of the 2002 Islam unit. (App. 43-44, 54-55.)

[8] The district court determined that the Eklunds' equitable relief claim was moot because Chase and Samantha had completed the seventh grade. (App. 14-15.) The case in its entirety is not moot since the Eklunds sought nominal damages for the violation of their constitutional rights.

the Free Exercise and parental rights issue. The Ninth Circuit denied the petition. (App. 3, 61-62.)

REASONS FOR GRANTING THIS PETITION

I. THE ESTABLISHMENT CLAUSE MUST BE APPLIED EQUALLY, NO MATTER THE RELIGION

This case presents questions at the core of this Court's Establishment Clause jurisprudence as it relates to the special context of a public elementary school, where courts are to be "particularly vigilant in monitoring compliance" with the Establishment Clause because parents entrust the public schools with *educating* their children, *not indoctrinating* them in *any* religion. *See Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987).

Unless this Court's Establishment Clause jurisprudence permits a different outcome depending on which religion is being taught in a public school, then the decisions of the lower courts here are flat wrong. Plainly, an Establishment Clause violation would have been found if, for example, Roman Catholicism had been taught to a public school seventh grade class in the same manner that Islam was taught here. No disclaimer, qualification, or clarification provided by the public school, nor any alleged "secular educational purpose," would have saved a comparable "Catholicism unit" from constitutional invalidation.

I.A. ***The First Amendment Forbids the Teaching of Islam in Public Schools.*** No one disputes that public schools may *teach about* religion from a "literary and historic viewpoint," *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968), but respondents crossed the line and began

teaching the Islamic religion as such by having these impressionable seventh grade students adopt the persona of a Muslim, recreate portions of Islamic religious acts and practices, memorize and recite verses from the Qur'an, and study handouts containing unqualified affirmations of Islamic faith. These patent Establishment Clause violations were perpetrated in the context of an "Islam unit" that directed students to "become Muslims" in furtherance of a School District policy of developing the moral, ethical, *and spiritual values* of impressionable youth.

Although teaching *about* religion in a public school is constitutionally permissible, here respondents moved far beyond a mere explanation of the historical or literary significance of Islam and placed students into the position of becoming veritable initiates into that religion. Students were plainly subjected to explicit religious instruction and induced to participate in explicitly religious practices under the guise of a "fun way to learn about history." (ER.850-51, 1781 ¶ 8). The "Islam unit" was nothing short of Islamic religious indoctrination and propaganda. (ER.1723 ¶ 14, 715-16, 718-26, 735-37, 749.)

Respondents' conduct would offend the Establishment Clause at any level of public education, but all the more so in classrooms filled with impressionable elementary school students who are easily manipulated by their role-model teachers. *See Edwards,* 482 U.S. at 583-84; *see also* Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses,* 41 Stanford L. Rev. 233, 237 n.26 (1989) (observing that the public school classroom is a perfect environment for programs of religious indoctrination by school authorities).

This Court has set forth several "tests" to determine an Establishment Clause violation.[9] Regardless of which "test" is used here, assigning seventh grade students to "become Muslims" violates the Establishment Clause.

In adopting the persona of a Muslim, impressionable seventh grade students took Islamic names, as Western converts to Islam generally do, referred to themselves by those Islamic names, and wore I.D. tags that identified themselves as Muslims by displaying their new Islamic names and by displaying the Star and Crescent Moon, a symbol of Muslims and an Islamic religious emblem equivalent to a Christian cross.[10] (ER.930, 1690, 1936, 1966, 2098-99, 2154, 2197.)

In the context of this Islam unit, impressionable seventh graders observed abridged versions of Islamic religious practices including memorizing and reciting the opening line of the Qur'an, "In the name of God, Most Gracious, Most Merciful. Praise be to God," and placing

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[9] Since the time this Court departed from the plain language of the Establishment Clause and determined that the Establishment Clause applies to the States through the Fourteenth Amendment, *Everson v. Board of Educ. of Ewing Township.*, 330 U.S. 1 (1947), this Court has announced at least three tests that apply in the public school context: 1). the *Lemon* test (secular purpose, primary effect, and entanglement), *Lemon v. Kurtzman*, 403 U.S. 602 (1971); 2). the "endorsement test," which is a "refinement" of the *Lemon* test, *County of Allegheny v. ACLU*, 492 U.S. 573 (1989); and 3). the "coercion" test, *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

[10] *The Oxford Dictionary of World Religions* 246 (John Bowker ed., Oxford U. Press 1997) (explaining that the crescent moon is a religious emblem of Islam); Annemarie Schimmel, *Islamic Iconography, in* 7 *The Encyclopedia of Religion* 64, 66 (Mircea Eliade ed., Macmillian Publishing Co. 1987) (explaining that the crescent moon is regarded as the typical sign of Islam and is generally seen as the "Islamic equivalent of the Christian cross").

this religious text on banners they hung on the classroom walls during the unit, in violation of the Establishment Clause. *See Stone v. Graham*, 449 U.S. 39, 42 (1980) (explaining that the posting of a religious text, such as the Ten Commandments from the Bible, on a public school classroom wall serves no educational function; the only effect of posting the Ten Commandments on a classroom wall is to induce students to read, meditate on, or perhaps obey the commandments, which violates the Establishment Clause, despite the secular educational purpose asserted for the posting of the religious text).

Students also observed other Islamic religious practices by memorizing and reading aloud verses from the Qur'an, engaging in acts of self-denial, including giving up lunch for extra credit, and doing acts of "charity" for others because, as one student observed, Muslims "have to give charity and have to do this to fulfill their religion." (ER.2161.)

Students were further indoctrinated in Islam by receiving handouts that prominently displayed the Star and Crescent Moon. (L.2, 4-9, 12-14.) The handouts also contained numerous affirmations of Islamic faith, some even classified as "**Truth**" and "**Fact**," such as "***Remember Allah always so that you may prosper***." (L.14; ER.2008; original emphasis), and "God's revelations were written down over a period of 23 years which today constitutes the Qur'an, the holy book of Muslims." (L.8 ¶ 2; ER.1945), and "The Holy Qur'an is God's word as revealed to Prophet Muhammad through the Archangel Gabriel. **Truth**," (L.10; ER.1968; original emphasis), and "The Qur'an has 114 chapters or suras, has 6,226 verses, and is God's third revelation that was revealed to Prophet Muhammad. **Fact**," (ER.1960; original emphasis), and "Complete this

phrase: *Allah is the only true God* and Muhammad is his _____ [answer: prophet]." (ER.1972).[11]

Furthermore, except for the Islam unit, in no other seventh grade unit did students act out or role-play *anything religious* or recreate any other *religious practice.* Such exclusivity stressed to these impressionable children the importance placed on Islam in comparison with other religions.

If the mere reading of Bible verses and recitation of the Lord's Prayer in a public school violates the Establishment Clause, even though the school district asserted a secular, educational purpose for such activities, *School Dist. of Abington Township v. Schempp,* 374 U.S. 203, 223 (1963), the challenged activities here cannot survive

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[11] Respondents argued below that Carlin orally qualified the religious declarations in the Islam Simulation materials by telling the students they were only "what Muslims believe." This is an inadequate response to a constitutional violation. Merely telling seventh graders that a particular religious group *believes* what the written materials state are unqualified religious truths, some even denominated as "**Truth**" and "**Fact**," will, if anything, *enhance* the credibility of the religious instruction in the class, especially when the teacher is having the children act out being a member of that religious faith. *See Herdahl v. Pontotoc County Sch. Dist.,* 933 F. Supp. 582, 597 (N.D. Miss. 1996) ("the content of a book of religious proclamation does not become secular instruction merely by informing students that the content is only what the Bible says; indeed for many students, that may well heighten the religious effect of the course.") Having public elementary students, for example, recite the Apostle's Creed does not become constitutional just because the teacher first tells the students that this is "only what a Christian believes."

In any event, Chase disputed that Carlin made all these oral clarifications in his particular section of the World History class. (ER.2096-98, 2110-11, 2114-16.) This and any other material fact that is in conflict between the parties should have prevented respondents from obtaining summary judgment.

constitutional scrutiny, especially when the primary effect of the Islam unit was the advancement of the Islamic religion.

The Ninth Circuit, however, simply concluded, without any analysis, that the "Islam program activities were not 'overt religious exercises' that raise Establishment Clause concerns." (App. 1 (citing *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1382 (9th Cir. 1984).)[12]

The Ninth Circuit's reasoning was wrong from start to finish. First, this Court has never countenanced "covert," "subtle," or "de minimis" religious exercises in a public school. Second, in the Islam unit, while studying Islam – *a subject itself overtly religious* – the seventh grade students did engage in overtly religious exercises. The classroom exercises, particularly the Zakaat and Ramadan exercises, were *explicit* adaptations for the classroom of Islamic rituals that required students to perform elements of those Islamic rituals. (ER.1693 ¶ 38.)

Although the exercises done in the unit were not the complete Islamic rituals (students, for example, would have had to have fasted for an entire month during Ramadan, rather than give up lunch for a day or candy for a week as done here), the adapted classroom exercises were nonetheless Islamic rituals and nothing other than Islamic rituals. (ER.1693 ¶ 38.) The connection between the actual Islamic practices and the adapted classroom practices was not coincidental or accidental. (ER.1693 ¶ 38); *compare*

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[12] In *Brown*, 27 F.3d at 1380-82, students engaged in "fantasy activities" based on a "secular source" that merely resembled witchcraft. Here, the activities were not fantasy activities but were explicit adaptations of Islamic rituals.

McGowan v. Maryland, 366 U.S. 420, 442 (1960) (permitting religious conduct that "*merely happens* to coincide or harmonize with the tenets of some or all religions").

This engagement of impressionable children in Islamic rituals did not occur in a drama class or as part of some fantasy experience, but rather during an Islam unit whose express aim was to have students adopt the persona of a Muslim and "*become* Muslims." These impressionable seventh graders engaged in Islamic worship because they were expected to *do what a Muslim would do.* (ER.1779-81 ¶¶ 2-8; 843-54; 1784 ¶¶ 17-21; 1825-26.)

As this Court has explained, students in a public elementary or secondary school may not be coerced, whether directly or subtly, to "support or participate in religion or its exercise, or otherwise act in a way which establishes a state religion or religious faith or tends to do so." *Lee v. Weisman,* 505 U.S. 577, 587 (1992); *see also County of Allegheny v. ACLU,* 492 U.S. 573, 659-63 (1989) (Kennedy, J., concurring in part, dissenting in part, joined by Rehnquist, CJ., and White and Scalia, JJ.).

Yet, this is exactly what happened to student Chase Eklund during the 2001 Islam unit in teacher Brooke Carlin's class. Chase faced the difficult choice of either conforming to the overwhelming majority's participation in the Islam unit or protesting. Chase's exposure to Islamic indoctrination and practices was contrary to his Christian faith.[13]

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[13] Based on what he had experienced in the Islam unit, Chase concluded that the students were "practicing" Islam. (ER.2044-46.)

What Chase went through for three weeks in his seventh grade Islam unit was far more egregious than what the older high school student went through in *Lee* by simply having to sit quietly through a nonsectarian and brief prayer at a voluntary high school graduation, an act this Court found so coercive that it violated the Establishment Clause. *Lee,* 505 U.S. at 577. Indeed, if a *classroom assignment* to engage in religious professions and practices, as occurred here, is not impermissible coercion, then it is difficult to image what would be coercive in the public school context.

I.B. ***There Should Be No Double-Standard Establishment Clause Jurisprudence.*** No matter which of the various "tests" is applied, an Establishment Clause violation would have been readily found if Catholicism or any other form of Christianity had been taught in the same manner, and for the same "cultural educational purposes," as Islam was taught here.

The Ninth Circuit would never have upheld a classroom "unit" in which

- Students "become Catholics" for three weeks, select a saint's name, and wear an I.D. tag around their necks displaying their new Christian name along with a Crucifix.
- The teacher reads the Lord's Prayer aloud to the students and has them memorize the first line of the prayer ("Our Father, who art in Heaven, hallowed be Thy Name,") and then has the students recite the first line of the Lord's Prayer to the teacher as the students leave class.

- Students memorize and recite passages from the New Testament and study handouts containing such unqualified affirmations of the Catholic faith, some classified as "**Truth**" and "**Fact,**" such as "Jesus Christ is the Son of God. **Truth,**" and "Jesus Christ is the Savior of all people. **Fact,**" and "***Remember Jesus Christ always so that you may prosper***" – even if these affirmations are orally qualified as just something "Christians believe."

- Students engage in Catholic practices in "abridged" form, such as a baptism without reciting the whole formula, confession without a priest, a day or two of Lenten self-denial, or reciting the first line of the Hail Mary prayer ten times to "simulate" an entire decade of the Rosary ("Hail Mary, full of Grace, the Lord is with Thee.").

- Students place banners on their classroom walls displaying such proclamations of faith as "In the name of the Father, the Son, and the Holy Spirit," or "In the name of Jesus Christ, who is Merciful and Compassionate."

Nevertheless, the Ninth Circuit permitted school-based activities indistinguishable in principle from these activities to take place in a public elementary school. Because the Establishment Clause contains no exemption for Islam, the Ninth Circuit's decision is patently contrary to this Court's Establishment Clause precedents, and this Court should grant certiorari. In the alternative, this

Court should summarily reverse the Ninth Circuit's decision.[14]

II. THE MERE EXISTENCE OF AN "OPT OUT" PROVISION UNKNOWN TO PARENTS AND STUDENTS CANNOT NEGATE A FREE EXERCISE CLAIM OR A PARENTAL RIGHTS CLAIM

The district court rejected Chase Eklund's Free Exercise claim and Jonas and Tiffany Eklund's parental rights claim. (App. 52-55, 58-59.) The district court did so simply because the School District had an "opt out" policy, unknown to the Eklunds, and because the court concluded that parents were not entitled to advanced notice about the use of the Islam Simulation materials – notice that would have permitted the Eklund parents to have inquired about the Islam unit and discovered the existence of the mysterious "opt out" provision so they could have exempted Chase from the religious indoctrination.

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[14] Fairly included in the questions presented is the Ninth Circuit's erroneous determination that the individual respondents were entitled to qualified immunity, which relates to petitioners' request for nominal damages. (App. 2.) These individuals violated clearly established law by, *inter alia*, teaching Islamic truths to students, coercing students to support and participate in religion or its exercise, indoctrinating students, and endorsing Islam. *Lee v. Weisman*, 505 U.S. 577 (1992) (coercion to support or participate in religion or its exercise); *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (endorsement); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (dangers of indoctrination); *Levitt v. Committee for Pub. Educ. & Religious Liberty*, 413 U.S. 472, 480 (1973) (indoctrination); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (purpose, primary effect, and entanglement); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (teaching religious truths); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963) (Bible reading and reciting the Lord's Prayer).

Although it is generally true that an "opt out" policy is sufficient to alleviate the coercive effect on a child's Free Exercise rights (and, consequently, their parent's rights), that legal principle presupposes that the family and child *are aware* of the policy in the first place. *See, e.g., Bauchman v. West High Sch.,* 132 F.3d 542, 557 (10th Cir. 1997) (parent and student aware of "opt out" policy but chose not to take advantage of the policy); *Grove v. Mead Sch. Dist. No. 354,* 753 F.2d 1528, 1533 (9th Cir. 1985) (same).[15]

It would seem a matter of common sense and due process that a plaintiff would first need to know about an "opt out" policy before that "opt out" policy could be used to bar that plaintiff's Free Exercise or parental rights claims.

Before the start of the Fall 2001 semester, Chase and his parents *were not informed of, nor aware of,* any policy that would have allowed Chase to have "opted out" of the Islam unit. (ER.170 ¶¶ 2-3; 645 ¶ 2.) Respondents did not inform the Eklunds of the means by which they could have protected Chase's Free Exercise rights and their own parental rights.

Worse, the Eklunds were not even placed on notice about the Islam unit so that they could have inquired

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[15] Generally speaking, the Free Exercise Clause allows people to believe and profess whatever religious doctrine they want, without government compulsion. *See, e.g., Employment Div., Dep't of Human Resources v. Smith,* 494 U.S. 872, 877 (1990); *Schempp,* 374 U.S. at 222. And, parents have the right to control the upbringing of their children, especially when it comes to their religious education. *See, e.g., Smith,* 494 U.S. at 881; *Wisconsin v. Yoder,* 406 U.S. 205 (1972); *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944).

about an "opt out" policy. Respondents *did not inform* them of the intended use of the Islam Simulation materials *before* they were used in Chase's class in 2001, and school officials did not seek parental consent *before* respondents exposed students to Islamic indoctrination. (ER.170 ¶ 2; 645 ¶ 2; 649 ¶ 2.) Thus, there was no reason for the Eklunds even to have questioned the matter before Chase's participation in the Islam unit.[16]

Chase's parents first learned about the use of the Islam Simulation materials *after Chase already had been exposed* to Islamic indoctrination and thus already suffered a violation of his Free Exercise rights by religious coercion. Chase's parents' own rights were likewise violated with no opportunity to avoid the violation.

The fact that the Eklund parents "opted out" Samantha in 2002 *after* their troubling experience with Chase in the Islam unit (and *after* finally receiving notice of the "opt out" policy) only demonstrates their profound religious objections to the use of the Islam Simulation materials and to the religious indoctrination of their children.[17]

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[16] The Islam Simulation materials themselves strongly recommend providing detailed notice to parents before the materials are used. (ER.1928.) Respondents ignored this admonition.

[17] The draconian *application* of the "opt out" policy on Samantha in 2002 was itself coercive and shows that even if Chase and his parents had known about the "opt out" provision that it was not much of an option to alleviate coercion. Samantha, who was left on her own to study and received little, if any, instruction or attention from her teacher, Michele Carr, during her "opt out," was denied the benefits of a public school education, was punished for having "opted out" of the Islam unit, and was singled out by respondents because of her religious beliefs. It would have been much easier for Samantha to have sat quietly in Carr's classroom during the Islam unit and dealt with the

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The decision to "opt out" a child is for the parents to make (not the school), especially with regard to the religious education of their children. Therefore, parents should be informed by the school so they can make the decision to protect their child's rights as well as to protect their own right to direct the religious education of their child. Such notice is necessary since parents entrust the public school to educate their children and not use the classroom to "advance religious views that may conflict with the private beliefs of the student and his or her family." *Edwards*, 482 U.S. at 583-84.

If, as in this case, parents are not so informed, then the mere existence of an "opt out" policy cannot reasonably be raised to defeat Free Exercise and parental rights claims. An *unknown* "opt out" is meaningless and does nothing to protect students, or their parents, from violation of their rights.

The Ninth Circuit's perfunctory affirmance did not discuss these issues. (App. 1-3.) This Court should grant certiorari to consider these questions. At a minimum, this Court should grant certiorari and direct the Ninth Circuit to address petitioners' Free Exercise and parental rights claims.

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inner turmoil associated with having to absorb religious indoctrination that was offensive to her Christian religious beliefs, as her brother Chase had done the year before, than to step out of the crowd and identify herself as a religious objector.

III. IN THE PUBLIC SCHOOL CONTEXT THERE SHOULD BE A UNIFORM COERCION STANDARD UNDER BOTH RELIGION CLAUSES TO THE CONSTITUTION

The district court suggested that there are different levels of coercion for Establishment Clause and Free Exercise Clause violations. (App. 51, 54-55.) The district court stated that although an Establishment Clause violation may proceed with just "subtle coercion," a Free Exercise claim requires "coercion." (App. 51, 54-55.) Again, the Ninth Circuit refused to address the Free Exercise issue, even though it affirmed the judgment of the district court. (App. 1-3.)

It would be anomalous to hold that only the Establishment Clause, but not the Free Exercise Clause, is violated when an impressionable seventh grader is *subtly coerced* to participate in a public school activity that promotes a religious concept or practice contrary to the faith in which that child was reared.

That the standard of coercion should be uniform for both religion clauses in public school cases is certainly suggested in *Lee*, 505 U.S. at 592: "As we have observed before, there are heightened concerns with protecting *freedom of conscience* from subtle coercive pressure in the elementary and secondary public schools."

Freedom of conscience is surely no less a concern under the Free Exercise Clause than it is under the Establishment Clause.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 1, 2006

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT.

JONAS EKLUND; et al., Plaintiffs-Appellants, v. BYRON UNION SCHOOL DISTRICT; et al., Defendants-Appellees.	No. 04-15032 D.C. No. CV-02-03004-PJH MEMORANDUM* (Filed Nov. 17, 2005)

Appeal from the United States District Court
for the Northern District of California
Phyllis J. Hamilton, District Judge, Presiding

Argued and Submitted October 19, 2005.
San Francisco, California

Before: D.W. NELSON, RAWLINSON, and BEA, Circuit Judges.

1. The Byron Union School District's (District) Islam program did not violate the Establishment Clause of the First Amendment. The Islam program activities were not "'overt religious exercises' that raise Establishment Clause concerns." *See Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1382 (9th Cir. 1994) (citation omitted).

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

2. The district court did not err in determining that the District and individual defendants were entitled to qualified immunity from suit because they did not violate a constitutional right, let alone a clearly-established one. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001); *see also Kennedy v. City of Ridgefield*, 411 F.3d 1134, 1141-42 (9th Cir. 2005) (applying *Saucier* two-part immunity test).

3. The district court did not err in determining that the Dupee plaintiffs had no standing. The Dupees' claims were speculative and relied on conjecture that the Dupee children might be assigned to a teacher using the Islam program at a future date. *See Loritz v. U.S. Ct. of Appeals*, 382 F.3d 990, 992 (9th Cir. 2004).

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.

JONAS EKLUND; et al., Plaintiffs-Appellants, v. BYRON UNION SCHOOL DISTRICT; et al., Defendants-Appellees.	No. 04-15032 D.C. No. CV-02-03004-PJH **JUDGMENT**

Appeal from the United States District Court for the Northern District of California (San Francisco).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California (San Francisco) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **AFFIRMED.**

Filed and entered 11/17/05

NOT FOR CITATION

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JONAS EKLUND, et al.,

Plaintiffs,

v.

BYRON UNION SCHOOL DISTRICT, et al.,

Defendants.

/

No. C 02-3004 PJH

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

(Filed Dec 5, 2003)

The parties' cross-motions for summary judgment came on for hearing on December 3, 2003 before this court. Plaintiffs appeared through their counsel Edward White, and defendants appeared through their counsel Linda Lye. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, the court hereby rules as follows.

BACKGROUND

Plaintiffs are Jonas and Tiffany Eklund, and their two children, Chase and Samantha. They object to the Byron Union School Districts use of a role-playing game to teach seventh grade world history students about Islam as violating the Establishment Clause of the First Amendment.[1]

[1] All other plaintiffs and claims have been dismissed from this litigation. Jonas and Tiffany Eklund bring claims solely in their

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Excelsior School is the middle school for the Byron Union School District, and. includes all seventh grade classes.[2] This year, Excelsior received a Distinguished School Award from the California Department of Education, honoring it as one of the state's "most exemplary and inspiring public schools." Castro Decl. ¶ 2, Exh. A. Chase Eklund was enrolled in Excelsior School for seventh grade during the 2001-2002 school year, and Samantha was in the seventh grade at Excelsior for the 2002-2003 school year.[3]

The California State Board of Education requires that seventh grade world history classes contain a unit on Islamic history, culture, and religion. Castro Decl. ¶¶ 5, 6; Exh. B at 28 ¶ 7.2 (Board of Education requirements). The state has approved a standard textbook, *Across the Centuries*, which is used in the Byron Union School District, but Excelsior teachers are also encouraged to use other instructional methods that they in their professional judgment feel best serve their students. *Id.* ¶¶ 7, 9, 12.

Accordingly, some teachers have chosen to supplement the Islam unit with portions of an interactive educational module. This module, which is called "Islam: A simulation of Islamic history and culture," suggests a variety of role-playing activities to engage students in the subject matter. The module is premised on having students role-play

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capacity as next friends of Chase and Samantha, and thus their claims are coextensive with their children's.

[2] Excelsior School only included seventh and eighth grade classes until the 2003 school year, when sixth grade classes were added, and the school was renamed Excelsior Middle School. Castro Decl. ¶ 3.

[3] Chase is currently in the ninth grade at the Byron Union district high school, and Samantha is in the eighth grade at Excelsior.

situations roughly equivalent to the five elements of faith in the Muslim religion. *See* Complaint Exh. A (entire module).[4] Experts in this litigation have testified that role-playing is an entertaining and effective method for students to learn material. *See.* e.g., Johnson Decl. ISO Eklunds' Opp. ¶ 22 (plaintiffs' expert, stating "role-playing and simulation are wonderful teaching strategies," but noting that all strategies must be viewed in context); Cuban Decl. ¶¶ 4-6 (defendants' expert, describing role-playing as "best practices" for middle school students).

The Eklunds claim that the use of the module violates the First Amendment.

A. Brooke Carlin's World History Class

During the 2001-2002 school year, defendant Brooke Carlin taught seventh grade world history at Excelsior. Chase Eklund was one of her students. The parties agree that Carlin used a variety of sources to teach the Islam unit, including assigned readings from *Across the Centuries*, classroom discussions, handouts, and geographic materials. Coincidentally, the Islam unit was underway on September 11, 2001, and the class also spent a week discussing the attacks in the context of world history. Carlin Decl. ISO Def. MSJ.("Carlin Decl.") ¶¶ 12-16.

The parties also agree that Carlin used modified portions of the Islam module. Carlin admits that she

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[4] The Five Pillars of Islam, practiced by devout Muslims, are: Shahada, or the profession of faith by Muslims in God; Salaat, prayer five times a day; Ramadan, ritual fasting from dawn to dusk during the month of Ramadan; Zakaat, or charity; and Haaj, a pilgrimage to Mecca.

distributed copies of the "Student Guide" portion of the Islam module to students as an introduction to the material. Complaint Exh. A at 1:12-13. The Student Guide states that "[f]rom the beginning [of this module], you and your classmates will become Muslims." *Id.* Carlin states that she went over the guide in great detail and specifically emphasized that the module was merely a role-playing game and that the students would not actually become Muslims through their participation in the module. A student enrolled in a different section of seventh grade world history that year confirms this. Carlin Decl. ¶¶ 26, 29; E.C. Decl. ¶¶ 9-12.[5] Chase does not deny this. *See* C. Eklund Depo. 100:8-101:10 (memory unclear about Carlin's explanation). *See also* E.C. Depo. 135:2-137:17; Carlin Depo. 83:7-85:24.

Students were divided into groups for the purposes of the module, and the students were also encouraged, but not required, to choose a Muslim name, to facilitate role-playing. *See, e.g.*, Carlin Decl. ¶¶ 27, 43; C. Eklund Depo. 44:9-17; E.C. Depo. 93:21-94:24. Chase selected the name "Affat." C. Eklund Decl. ¶ 2. Carlin did not refer to the students by their Muslim names, though the students sometimes referred to each other by the Muslim names while in their groups, or in a joking manner outside of class. Carlin Decl. ¶ 43; C. Eklund Depo. 98:24-99:15; E.C. Depo. 175:5-178:1.

For the first two pillars of Islam, Carlin admits that, in the classroom, she read Muslim prayers and portions of

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[5] The parties have agreed, pursuant to this Court's General Order no. 53, that all non-party minor children will be referred to by their initials only.

the Qu'ran aloud in class, required student groups to recite a line from a Muslim prayer, such as "In the name of God, Most Gracious, Most Merciful," on their way out of class, and had the students make group banners. Carlin Decl. ¶¶ 57-67; C. Eklund Depo. 114:1-115:23, 131:24-135:24. Some banners stated the opening words of the Qu'ran in Arabic ("Bismillah," which means, in the name of God, the Merciful, the Compassionate"), and some groups independently wrote out the English translation of "Bismillah" on their banners as well. C. Eklund Depo. 131:9-22; C. Eklund Decl. ¶ 2; E.C. Depo. 98:5-99:8, 202:12-203:14. However, this was not required. C. Eklund Depo. 112:23-113:17, 131:9-22. Banners have been assigned as non-book-based classroom assignments in other classes at Excelsior. E.C. Decl. ¶ 28.

For the third and fourth pillars, Carlin also required students to give up things for a day, such as watching television or eating candy, to demonstrate the Islam principle of Ramadan, or fasting.[6] Carlin Decl. ¶¶ 68-71; C. Eklund Decl. ¶ 3; *see also* E.C. Depo. 99:9-100:15. Carlin also required students to perform volunteer community service, such as school beautification or assisting in school administration, in conformance with the Muslim requirement of Zakaat, or charitable donation. Carlin Decl. ¶¶ 73-75. *See also* C. Eklund Depo. 120:19-121:20; E.C. Depo 102:5-103:7. Community service is often a component of school activities. Carlin Decl. ¶ 74. These four activities took about a week, in an eight-week unit on Islam. Carlin Decl. ¶¶ 9, 45.

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[6] The Eklunds allege that Carlin gave extra credit to students who fasted for a lunch period. C. Eklund Depo. 119:17-120:18. Carlin denies this. Carlin Decl. ¶ 68.

Finally, to demonstrate the fifth pillar of Hajj, or pilgrimage to Mecca, Carlin had the students participate in a board game, called "Race to Makkah." The students were divided into groups, and assigned a camel game piece. The groups would roll the dice and move along the board based on chance and the students' knowledge of information about Islam, with the goal of the game to arrive at "Mecca." Carlin Decl. ¶¶ 76-87; *see also, e.g.*, C. Eklund Depo. 80:14-85:7. The information was presented in the form of flash cards (called "wisdom" or "quiz" cards) that designated pieces of religious information in three categories, designated as "trivia," "truth," or "fact." Certain "truth" or "fact" cards included statements of religious faith such as "The Qu'ran . . . is God's third revelation that was revealed to Prophet Muhammad," or "The Holy Qu'ran is God's word as revealed to Prophet Muhammad through the Archangel Gabriel," without any qualifying language such as "Muslims believe . . . " prefacing the statement. *See, e.g.*, Complaint Exh. A at 2:11-35 (wisdom and quiz cards). However, when using the cards, Carlin explained that these statements were what Muslims believed and not actual historical fact. Carlin Decl. ¶ 82; C. Eklund Depo. 94:21-96:15.

Carlin also permitted students to dress up in Arabic-style clothing for their group presentations.[7] Carlin Decl. ¶ 51; E.C. Depo. 118:5-125:10. Chase, however, refused to do so, claiming that it would make him feel "weird." C. Eklund Depo. 107:16-108:24.

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[7] The Eklunds claim that Carlin also required students to design and color an Islamic prayer rug. C. Eklund Depo. 105:19-24, 106:9-107:11. Carlin denies this. Carlin Decl. ¶91.

As part of the final, Carlin required the students to write an essay critiquing elements of Islamic culture. The essay assignment stated, "BE CAREFUL HERE – if you do not have something positive to say, don't say anything!!!" Carlin Decl. Exh. I. Carlin stated that she explained to the class that this caution was included because this assignment followed closely after the events of September 11, 2001 and she feared the students might otherwise use the essay to express racist remarks. Carlin Decl. ¶ 90. Carlin explained to the class that they could express constructive criticism about Islamic culture in their essay, but it had to be supported with reasons. *Id.* The Eklunds do not challenge this version of the facts.

B. Other Classes at Excelsior

Other classes at Excelsior also use role-playing simulations to enhance the students' learning experiences. For instance, the eighth grade U.S. history class participates in a mock Senate, and the seventh grade biology class participates in a mock medical school. Castro Decl. ¶¶ 10, 11. The seventh grade world history class also uses role-playing simulations for their unit on medieval Europe. Carlin Decl. ¶¶ 95, 96. In that unit, Chase recalled dressing up as a priest, which he did not feel related to religion and did not make him feel uncomfortable. C. Eklund Decl. ¶ 3; C. Eklund Depo. 37:13-16, 43:16-44:5, 109:15-20. ("That doesn't have anything really to do with God or anything or anybody that you look up to.")

Chase agreed that he understood throughout the other role-playing simulations that he had not actually become a Senator or a priest during the class. C. Eklund Depo. 51:5-54:15, 108:25-109:23. Chase also agreed that

many of the role-playing elements of the Islam unit were not real either – for instance, he agreed that his "camel" game piece was not really a camel, his name did not become "Affat," and he did not actually become a Muslim through his participation in the Islam module. *Id.* at 53:2-54:15, 84:22-85:7.

Other classes at Excelsior also teach about religions. For instance, one unit of seventh grade world history dealt with the rise of Christianity after the fall of the Roman Empire, and another with the role of Buddhism in Chinese culture. Carlin Decl. ¶¶ 93, 94; *see also, e.g.*, C. Eklund Depo. 56:22-58:22; E.C. Depo. 41:1-46:13. in sixth grade ancient history, the students also learned about the Greek and Roman mythological gods. C. Eklund Depo. 55:4-56:15. However, these units did not involve role play. *See, e.g.*, E.C. Depo. 252:17-254:22, 268:22-269:3.

C. Michelle Carr's World History Class

The next year, 2002-03, defendant Michelle Carr taught seventh grade world history. One of her students was Chase's sister, Samantha.

The Eklunds requested that Samantha be excused from the Islam unit, which she was. Carr Decl. ¶ 21. Samantha testified that when she asked to be excused, Carr seemed angry. Samantha also testified that the other student who also wished to be excused was nervous about giving Carr the note. Samantha and the other student were separated from the rest of the class and assigned readings from the textbook on the French Revolution. Carr would periodically check in on the two students during class. Samantha claims that Carr did not explain or answer any questions about the reading, though Samantha also

admits that she never asked Carr any questions. S. Eklund Depo. 45:16-54:20; *see also* S. Eklund Decl. re Free Exercise MSJ ("S. Eklund Decl.") ¶¶ 2, 3.

Carr testifies that she mostly relied on *Across the Centuries* for her Islam unit. She distributed a few handouts from the Islam module, including a map, a glossary, and pictures of the Arabic alphabet, and the students used a modified version of the "Race to Mecca" game. She did not use any of the role-playing elements of the module. Carr testifies that she always prefaced all her remarks with the phrase, "Muslim people believe . . . " and always distinguished between Muslim beliefs and historical facts. Carr Decl. ¶¶ 9-19. Because Samantha was not there, the Eklunds do not challenge this version of the facts.

At the end of the Islam unit, Samantha was given a separate test on the material she was studying, which she failed. S. Eklund Decl. ¶ 3.

ANALYSIS

A. Legal Standard

1. Summary Judgment

Summary judgment is appropriate when the evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

2. Establishment Clause

The First Amendment states that "Congress shall make no law respecting an establishment of religion . . . "

U.S. Cons., amend. I. This portion of the First Amendment is known as the Establishment Clause, and through the Fourteenth Amendment, the states and their school districts are required to comply with its terms. *Lee v. Weisman*, 505 U.S. 577, 580 (1992). The Supreme Court has outlined three separate, but interrelated, tests for evaluating Establishment Clause claims: the *Lemon* test, the *Lynch* endorsement test, and the *Lee* test. *See generally, e.g., Newdow v. U.S. Congress*, 328 F.3d 466, 485 (9th Cir. 2003), *cert. granted in part*, 124 S. Ct. 384 (U.S. Oct. 14, 2003) (No. 02-1624) (Pledge of Allegiance case, explaining history of Establishment Clause standards).

Under *Lemon v. Kurtzman*, the government action at issue must 1) have a secular purpose; 2) not have the principal or primary effect of advancing or inhibiting religion; and 3) not foster excessive government entanglement with religion. 403 U.S. 602, 612-13 (1971) (in the context of the constitutionality of granting state aid to nonpublic schools).

However, in *Lynch v. Donnelly*, Justice O'Connor's concurring opinion set forth a "clarification" of Establishment Clause jurisprudence, which banned government activity that created "excessive entanglement with religious institutions" or that represented "government endorsement or disapproval of religion." 465 U.S. 668, 688 (1984) (O'Connor, J. concurring) (nativity scene in city Christmas display). Endorsement in this context was defined as "send[ing] a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Id.* This test was endorsed over the *Lemon* test in *County of Allegheny v. ACLU*, 492 U.S. 573, 592 (1989) (creche and

menorrah in city display), and subsequent cases have adopted an "endorsement" test and declined to analyze the *Lemon* entanglement requirements. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639, 648-49 (2002) (school vouchers).

Next, the Supreme Court decided *Lee v. Weisman*, 505 U.S. 577 (prayer at school graduation). *Lee* declined to reconsider *Lemon*, having determined that a *Lemon* analysis was unnecessary on the facts of the case, but also promulgated a new "coercion test." "[A]t a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise to act in a way which establishes a state religion or religious faith, or tends to do so." 505 U.S. at 587.

All of these tests are applied, often in the same case. *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 310-16 (2000) (prayer before school football games, applying all three tests interchangeably). Thus, the Ninth Circuit has stated that "[w]e are free to apply any or all of the three tests, and to invalidate any measure that fails any one of them." *Newdow*, 328 F.3d 487 (applying *Lee* coercion test only).

B. Jurisdiction

1. Mootness

As an initial matter, the court does not have jurisdiction to grant equitable relief in this case. The Ninth Circuit has held, in the context of claims raised by a graduated high school senior, "It is well-settled that once a student graduates, he no longer has a live case or controversy justifying declaratory and injunctive relief against a

school's action or policy." *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1098 (9th Cir. 2000), cert. denied, 532 U.S. 905 (2001) (claims for declaratory and injunctive relief based on school's refusal to permit proselytizing valedictorian speech for graduated senior, because "as graduates of Oroville, [plaintiffs] will never again be required to omit sectarian references from their Oroville graduation presentations.").

Similarly, both Chase and Samantha Eklund have now completed the seventh grade, and will never be required to learn Islamic history in seventh grade world history class again. They thus may not move for equitable relief in this case.[8] However, "although a student's graduation [or completion of an academic program] moots his claims for declaratory and injunctive relief against school officials, it does not moot his damages claims." *Cole,* 228 F.3d at 1099-1100 (citation omitted). Chase and Samantha thus may proceed in this matter, but on their nominal damages claim only.

2. Immunity from Suit

Furthermore, both defendant Byron Union school district and defendant Thomas Meyer, the superintendent

[8] The Eklunds argue that the court should nonetheless grant equitable injunctive relief in its discretion, citing *Bilbrey v. Brown*, 738 F.2d 1462, 1470 (9th Cir. 1984) (student claiming Fourth Amendment violations by school). However, as defendants pointed out in oral argument, *Bilbrey* arose in the context of a certified class action, so the mooting of the named plaintiffs' claim would not have affected the standing of the entire class. *See, e.g., County of Riverside v. McLaughlin*, 500 U.S. 44, 51 (1990). Here, where the Eklunds have not brought a class action suit, the court loses equitable jurisdiction as soon as Chase and Samantha's claims become moot. *Cole*, 228 F.3d at 1099.

of the school district, were sued in their official capacities only. As the parties have agreed, the Eleventh Amendment bars damages claims against state agencies, and thus summary judgment in favor of those two official parties is granted. *Cole*, 228 F.3d at 1100 n. 4; *see also* March 12 Order at 12 (citations omitted).

The court therefore addresses the claims raised under the Establishment Clause against defendants Carlin, Carr, and Principal Nancie Castro only.

C. Establishment Clause Claims

As an initial matter, the Supreme Court has held that the public schools bear the responsibility of educating their students about the history and cultures of other countries, which often must include a discussion of religion as well. "[I]t might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization." *School District of Abington Township. Penn. v. Schempp*, 374 U.S. 203, 225 (1963); *see also Engel v. Vitale*, 370 U.S. 421, 434 (1962) ("The history of man is inseparable from the history of religion.").

All parties agree that the school district is entitled to teach students a basic history of Islamic religion and culture. The parties instead dispute whether role-playing games, and the details of this particular role-playing game, are a proper way to do so.

1. "Five Pillars of Islam" Activity

The parties agree that the students were taught about the five pillars of the Islamic faith, and that the students were asked to role-play or perform activities that were roughly analogous to each pillar. Thus, to demonstrate the Muslim profession of faith in Islam, the students made banners announcing their group's city affiliation, and to demonstrate the requirement of daily prayers, Carlin read portions of poetic prayers from the Qu'ran, and students informally recited lines of an Islamic prayer in class. The students also gave up something for a day to represent Ramadan, performed community service to represent the Muslim pillar of charity, and played a trivia board game to represent the Muslim hajj pilgrimage. Also, to further the role-playing experience for the "Five Pillars of Islam" activity, the students were encouraged to select Muslim names and dress up in Arab clothes.

The Eklunds contend that the role-playing activities, taken as a whole, constitute the practice of Islam, and the school's use of the Islam simulation module thus constitutes an impermissible endorsement of the Islam faith.

a. Coercion – *Lee*

Under *Lee*, the Establishment clause is violated if a school coerces students into participating in religious activities. 505 U.S. at 587. For the purposes of the *Lee* test, "subtle and indirect pressure," such as social pressure from peers to conform to school-set norms, can constitute coercion, even if students are otherwise free to opt out of the activity. *Id.* at 592-94; *see also Newdow*, 328 F.3d at 488. However, defendants argue that whether or not Chase and Samantha were "coerced" into participation in

the role-playing module, the module does not violate *Lee* because, as a threshold matter, none of the activities in questions constituted "religious" activity.

In determining whether the activity in question is considered "religious," the court conducts an objective review of whether the students were actually practicing a religion. *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1379 (9th Cir. 1994) ("the Supreme Court and this circuit have consistently applied an objective standard for public school Establishment Clause inquiries," citing, *inter alia*, *Lee*); *see also Altman v. Bedford Central Sch. Dist.*, 245 F.3d 49, 78 (2d Cir. 2001), *cert. denied*, 524 U.S. 827 (2001) (Earth Day activities to increase environmental awareness in high school cannot be viewed by an objective observer as practicing the religion of Gaia, which advocates the divinity of the Earth); *cf.*, *e.g.*. *Newdow*, 328 F.3d at 488-89 (requiring children affirmatively to pledge their devotion to a nation "under God" considered a religious act, given the legislative history of the pledge and the context in which the pledge is recited).

Objectively, the students at Excelsior cannot be considered to have performed any actual religious activities in their seventh grade world history class. Devout Muslim practitioners who adhere to the actual five pillars of Islam must 1) publicly proclaim their faith that there is only one God, and Muhammad is His prophet; 2) pray five times a day, facing Mecca; 3) donate to charity as an act of faith; 4) fast for the month of Ramadan from sunrise to sunset; and 5) make a pilgrimage to Mecca once in their life, if they are financially and physically able to do so. *See*, *e.g.*, Complaint Exh. A at 1:24, (history text provided in module); Carlin Decl. ¶¶ 13, 74; Carlin Decl. Exh. C at 63 (explanation of five pillars of faith in *Across the Centuries*).

By contrast, the students did not perform the actual five pillars of faith in their class – they did not proclaim faith in one God or belief in Muhammad as His prophet, pray five times a day, fast for a month, make charitable donations, or travel to Mecca. Instead, the students participated in activities which, while analogous to those pillars of faith, were not actually the Islamic religious rites. *See* Carlin Decl. ¶¶ 57, 60, 61, 68, 70, 72, 76; Campo Decl. ¶¶ 3 (plaintiffs' expert, describing activities performed by students); E.C. Decl. ¶¶ 27, 30-33, 35, 39; C. Eklund Depo. 114:1-115:23; 120:19-121:20 (describing his activities); Spencer Depo. 21:22-25; Spencer Decl. ISO Plaintiffs' MSJ Opp. ¶¶ 8-12, 23, 25, 26, (admitting that students did not actually perform Muslim rituals).[9] In fact, at oral argument, plaintiffs' attorney agreed that these activities were merely "approximations" of Muslim religious activity.

Role-playing activities which are not in actuality the practice of a religion do not violate the Establishment Clause. In *Brown*, parents challenged school reading assignments for elementary school students that discussed witches and instructed the students to pretend to cast magic spells. The parents claimed that the school was

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[9] In citing expert testimony, the court is mindful that expert testimony is not often relevant in the court's determination of constitutionality, and does not cite it for that purpose here. "The Supreme Court generally has not relied on expert testimony to determine whether a school practice [violates the Establishment Clause]. Instead of engaging in a 'battle of the experts' in deciding Establishment Clause cases, courts have relied upon assumptions about a 'hypothetical observer' . . . to determine [constitutionality]." *Brown*, 27 F.3d at 1382 (noting that expert testimony does not raise disputed issues of material fact when the expert testimony itself is "of little use in determining whether a practice is unconstitutional").

asking the children to practice actual pagan or Wiccan religions, in violation of the First Amendment. 27 F.3d at 1377. The Ninth Circuit held that these reading assignments were merely "fantasy activities . . . that happen to resemble religious practices" and thus "are *not* 'overt religious exercises' that raise Establishment Clause concerns." *Id.* at 1382. Similarly, the students here were engaged in simulations of Islam activities that were similar to, but not actual, elements of the Islamic faith. Objectively speaking, these "approximations" of Islamic behavior cannot be considered actual "religious activity" for the purposes of the *Lee* coercion test, and therefore the *Lee* test cannot be met.

In addition, there is no evidence that the students performed these classroom activities with any devotional or religious intent. *See* C. Eklund Depo. 53:16-54:15 (stating that he did not believe that anything he had done had made him Muslim), E.C. Depo. ¶ 31 ("I never did anything in Ms. Carlin's class that made me think I was engaging in prayer of any kind."). [10] The students' subjective lack of spiritual intent further demonstrates that the activities in question cannot objectively be considered "religious activity" for the purposes of Lee. *See Bauchman v. West High School*, 132 F.3d 542, 552 n. 8 (10th Cir. 1997)

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[10] Carlin also notes that none of the students performed the role-playing activities with any of the requisite ritualistic formalities of the Muslim religion. For instance, when reciting lines of the Muslim prayer, none of the students were bowing or kneeling, directing themselves towards Mecca, engaging in ritual washing, or taking off their shoes. Carlin Decl. ¶¶ 61, 62. *See also, e.g.*, C. Eklund Depo. 135:15-136:8 (confirming that Islamic religious ritual requirements for prayer were not met). This further demonstrates the students' lack of devotional intent.

(under Lee, the singing of Christian devotional music in a high school choir in church settings not considered religious activity when no showing was made that the songs were sung in "a worshipful context"); *Altman*, 245 F.3d at 78 (no objective observer could find high school's Earth Day activities religious activity because plaintiffs made no showing that the Earth was worshipped as divine at the event); *see also Doe v. Duncanville Independent Sch. Dist.*, 70 F.3d 402, 407 n. 7 (5th Cir. 1992) (singing of religious song as school choir "theme song" not considered religious activity because song was not used as an invocation or in any religious context).

Thus, the role-playing elements of the Islam unit does not require that the students engage in actual "religious activity," and the *Lee* coercion test therefore cannot be met.

b. Endorsement of Religion – *Lemon* and *Lynch*

The Eklunds next argue that, even if the activities in question do not constitute actual religious activity, the nature of the role-playing module nonetheless has the effect of advancing or endorsing the Islam religion, in violation of *Lemon* and *Lynch*. The Eklunds argue that the students could reasonably have believed they were practicing the Islam religion, even if in fact they were not, and the students could also have believed that their grade in the class would be based on their willingness to believe the tenets of Islam.

Under both *Lemon* and *Lynch*, the Islam module is unconstitutional if it has the primary effect of either endorsing or disapproving of any religion. 465 U.S. at 688; 403 U.S. at 612-13. The effect of the role-playing must be

assessed from the objective standpoint of a reasonable observer (here, a seventh grader at Excelsior), and the court must also take the larger context of the challenged activity into account. *Id.* at 1378-80; *see also Grove v. Mead School Dist. No. 354*, 753 F.2d 1528, 1540 (9th Cir. 1985) (Canby, J. concurring) (cited in *Brown*, stating that activity must be considered "as a whole in the context of the entire curriculum," and noting that "objectivity is to be assessed with reference to the manner in which often highly partisan, subjective material is presented, handled, and integrated into the school curriculum . . . "). Furthermore, in evaluating constitutionality, the court must consider the primary purpose of the activity as well as the facts of the situation at hand. *See, e.g., Lemon*, 403 U.S. 602, 612-13 (first prong of analysis); *Lynch*, 465 U.S. at 688.[11]

i. Objective Review of Program

Upon an objective review of the situation at hand, the students would not reasonably have understood the module to have endorsed Islam over other religions merely because of the role-playing activities at issue. As a matter of law, "a practice's mere consistency with or coincidental resemblance to a religious practice does not have the primary effect of endorsing religion." *Brown*, 27 F.3d at 1381 (role-playing witchcraft rituals not an endorsement of Wiccan religion). Thus, the mere fact that the Islam role-playing module involved approximations of Islamic

[11] It has been observed that *Lynch* collapses the *Lemon* test into these two prongs and eliminates the "entanglement" requirement. *Newdow*, 328 F.3d at 486. Since these two prongs are dispositive here, entanglement need not be discussed.

religious acts is not sufficient to create an endorsement of the Islamic faith.

Furthermore, viewing the module within its larger context, a reasonable Excelsior student would not have believed that it represented an endorsement of religion either. The students participated in many role-playing exercises in their middle school years, and learned about a number of religions as well, for purely educational purposes. Carlin also repeatedly explained to the students the nature of the Islam role-playing assignment, explained that it did not represent reality, and the students subjectively understood the distinction between the simulation and their actual religious faith. *See, e.g.*, C. Eklund Depo. 53:16-54:15; Carlin Decl. ¶¶ 26, 29; E.C. Decl. ¶¶ 9-12; Carlin Depo. 83:7-85:24; E.C. Depo. 135:2-137:17. Given these facts, an objective review of the activities in question does not result in a finding of an endorsement of Islam. *Cf., e.g., Bauchman*, 132 F.3d at 555 (singing of Christian choral music in churches by high school choir, in settings similar to church services, did not represent an endorsement of Christianity, when viewed in the context of Salt Lake City, a highly religious area, and given that the choir also performed secular songs in churches, and performed both secular and religious works in non-religious settings as well).

ii. Secular Purpose

Defendants also argue that the use of the Islam module was motivated by the purely secular purpose of instructing students about Islamic culture and history. *See, e.g.*, Castro Decl. Exh. B (California requirement that world history classes present unit on Islam). Plaintiffs

present no evidence refuting that explanation. The court therefore determines that defendants acted with an appropriate secular purpose in its use. *See Lynch,* 450 U.S. at 680 (non-secular purpose may only be found "when . . . there was no question that the . . . activity was motivated *wholly* by religious considerations") (emphasis added).

The secular nature of the activities further demonstrates the module's non-endorsement of religion. Even if the role-playing module is presumed to involve religious, or quasi-religious activity, the Ninth Circuit has stated that "[s]ome student participatory activity involving school-sponsored ritual may be permissible . . . where the activity is used for secular pedagogical purposes." *Brown,* 27 F.3d at 1380 n. 6 (citing as examples reenactments of actual religious rituals, such as an American Indian dance, the Last Supper, or a Passover dinner, "if presented for historical or cultural purposes").[12] Thus, even quasi-religious role-play is permissible if it does not objectively endorse one religion over another.

Similarly, plaintiffs claimed at oral argument that the display of the group banners showing portions of the Bismillah was analogous to the display of the Ten Commandments in school classrooms, which has been found unconstitutional. However, the display of the Ten Commandments in a classroom setting was found unconstitutional because the Supreme Court determined that upon objective review, the primary purpose for their display was to endorse Christianity. *Stone v. Graham,* 449 U.S. 39, 41

[12] This language in *Brown* appears to imply that, when a proper secular purpose is shown in the state's use of actual religious activity, the *Lemon* test will still be applied, even if *Lee* would otherwise potentially be violated.

(1980). Here, in contrast, the primary purpose of the Islam module was the secular goal of educating students about Islamic culture. Thus, even the display of religious texts in a purely secular context will survive Constitutional review as well.

c. Conclusion

The role-playing games therefore neither constitute actual religious activity for the purposes of Lee nor an endorsement of Islam for the purposes of *Lemon* and *Lynch*, and thus Carlin's use of the role-playing module in Chase's class does not violate the Establishment Clause.[13]

2. Educational Assignments

The Eklunds also argue that certain reading and writing assignments given in the role-playing module violate the First Amendment as well.[14] The Eklunds claim

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[13] The Eklunds also argue, through their experts, that the role-playing module need not even be assigned, since the textbook *Across the Centuries* provides adequate exposure to Islamic history. However, since the module is constitutional, the state is not required to refrain from its use. "[O]nce the state is free to use a secular means of attaining a goal, it is not required to use an alternative secular means that is less likely to be associated with religion." *Brown*, 27 F.3d at 1382 (no endorsement of religion through decision to use the materials at issue in the suit).

[14] In an abundance of caution, defendants also move for summary judgment based on the Eklunds' expert's statements that the Islam unit and module should have included more information about Islamic religious wars and terrorism, and therefore the unit endorsed Islam by implication. *See, e.g.*, Spencer Expert Report at 23-24 (at Lye Decl. ISO Def. MSJ Exh. G, stating that the Islam unit should have included discussions of anti-Christian jihads in the seventh century, and information about Osama bin Laden). Assuming for the purposes of this motion that the material presented an unfairly partisan and religious

(Continued on following page)

that when playing the "Race to Makkah" trivia game, Carlin permitted the students to view the "wisdom" and "quiz" cards provided for use in the game. Certain of these cards contain statements concerning the tenets of Muslim religious belief, and ask the students to provide the "right" answer. Complaint Exh. A at 2:11-35. The Eklunds object because some of the cards state that certain religious beliefs are "true," when they are merely what Muslims believe to be true.[15]

The plaintiffs also complain that, in the five-paragraph essay assignment critiquing Islam, Carlin stated, "BE CAREFUL HERE – if you do not have something positive to say, don't say anything!!!" Lye Decl. Exh. I at 5. Plaintiffs claim that this instruction had the effect of

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view of Islam, this would nonetheless not be a basis for finding the reading assignments in the module unconstitutional. It is permissible to assign even partisan religious texts without violating the First Amendment. *Grove*, 753 F.2d at 1540 (concurring opinion, noting that "Luther's 'Ninety-Nine Theses' are hardly balanced or objective, yet their pronounced and even vehement [anti-Catholic] bias does not prevent their study in a history class's exploration of the Protestant Reformation, nor is Protestantism itself 'advanced' thereby"), *cited in Brown*, 27 F.3d at 1380.

[15] The statements to which the plaintiffs object include "The Qu'ran . . . is God's third revelation that was revealed to Prophet Muhammad – *Fact*;" and "The Holy Qu'ran is God's word as revealed to Prophet Muhammad through the Archangel Gabriel – *Truth*." Other statements of this type include: "The Black Stone came down from heaven with Adam . . . *Truth*;" "Jinns, who were created from fire, can be good or evil, with the chief evil Jinn being Satan – *Fact*;" "Archangel Gabriel came to Prophet Muhammad while he meditated in a cave and revealed God's word to him . . . – *Truth*;" "Complete this phrase: 'Allah is the only true God and Muhammad is his ___.'" While there is no evidence that any individual card was used by Carlin in the "Race to Makkah" game, the court will assume for the purposes of this motion that students were exposed to all of them.

instructing students that they were required to support Islam in order to receive a good grade on the essay.

The cards and the essay assignment, however, do not endorse Islam under either *Lemon* or *Lynch*.[16] As for the cards, the "Wisdom cards" are elements of the "Race to Makkah" game, which were divided into three categories: trivia, fact, and truth. Complaint Exh. A at 2:2 (module teacher's manual). These cards were to be collected during the game and read to the class. Carlin Decl 80, 83. "Trivia" and "truth" cards were worth three points in the game, while fact cards were worth four. Complaint Exh. A at 2:10. The Quiz cards, in contrast, requires the student to answer the question, for points. *Id.* Carlin claims, and the Plaintiffs do not contest, that she explained that the cards represented only what Muslims believe. Carlin Decl. ¶ 82; C. Eklund Depo. 94:21-96:15.

Given the context in which the cards were used, no-objective observer could conclude that the cards endorsed Islam. As an initial matter, students may read and discuss even extremely proselytizing individual materials, in a classroom setting without violating the First Amendment. *Brown*, 27 F.3d at 1380, *citing Grove*, 753 F.2d at 1540.[17] Furthermore, even if the materials themselves were otherwise impermissible, the students were in fact able to distinguish between actual historical truth and a positive

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[16] The *Lee* test is not implicated here since neither answering questions nor writing a school essay can be construed as religious activities, and plaintiffs do not so contend.

[17] Plaintiffs' argument that the sectarian nature of the written materials would override Carlson's secularizing verbal explanations in the classroom is thus insufficient to state an Establishment Clause claim.

statement of Muslim belief, and Carlin actively emphasized that difference in the classroom setting. The reading of perhaps non-ideally worded cards does not represent an endorsement of religion or a violation of the Establishment Clause.

Similarly, the essay assignment is constitutional as well. Carlin explained that in class she had discussed with the students that, in light of the heightened emotions concerning the September 11 terrorist attacks, racist comments about Islam would not be tolerated in the essay and any anti-Islam commentary was to be supported with at least one reason. Carlin Decl. ¶ 90. Plaintiffs do not deny that Carlin provided this explanation. In that context, the statement "if you do not have anything positive to say, don't say anything!!!" is properly understood as a reminder to the students of Carlin's cautionary instructions and cannot be said to endorse Islam in any way.

Thus, none of the challenged educational assignments at issue in Carlin's 2001 world history class violate the Establishment Clause either.

3. Opt-Out

Plaintiffs next sue Michelle Carr for Establishment Clause violations, based on her alleged anger with Samantha Eklund when she opted out of the Islam unit, and her alleged subsequent failure to provide Samantha with additional instruction on her alternate work assignment.

Assuming for the purposes of this motion the truth of the Plaintiffs' allegations, they remain nonetheless insufficient to show a violation of the First Amendment in Carr's use of the role-playing module. Merely reading portions of

the module and generally discussing Muslim beliefs in a schoolroom context, as the parties admit was the extent of Carr's instruction, is permissible under the First Amendment. *Brown*, 27 F.3d at 1380 ("reading, discussing, or contemplating" other religions is "not reasonably viewed as communication of a message of endorsement").[18] Thus, even if Samantha perceived Carr as becoming angry at her for requesting not to participate in the unit, or that Carr seemed unwilling to answer her (unasked) questions about her alternate assignment, that is nonetheless not enough to revive an otherwise-improper Establishment Clause claim. *Bauchman*, 132 F.3d at 556 (student's allegations of retaliation and harassment based on decision to opt out of class later found to be constitutional, if true, demonstrated a "lack of sensitivity, crudeness, and poor judgment" on the part of the school community," but "d[id] not rise to the level of a constitutional violation," and could not be used to "breathe constitutional life into otherwise unactionable conduct.").

Carr thus did not violate Samantha's constitutional rights.

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[18] Plaintiffs argued at the hearing that Samantha's claim was also based on a "pattern and practice" of Establishment Clause violations at Excelsior, arguing that Samantha and her parents did not know at the time that she opted out of the class that Carr's use of the module was more limited than Carlin's. However, even if Carr had used the module to the same extent as Carlin, Carlin's use of the module was also constitutional, so the same argument applies.

4. Principal Castro

Plaintiffs also appear to have raised claims against Principal Castro in her supervisory capacity.[19] However, because neither Carlin nor Carr violated the plaintiffs' constitutional rights, Castro cannot be held liable for any constitutional violation in her supervisory role either. *Quintanilla v. City of Downey,* 84 F.3d 353, 355 (9th Cir. 1996) (failure to show violation of constitutional rights by subordinates destroys § 1983 claim against supervisor).

C. Qualified Immunity

Finally, even if defendants were to have violated the Establishment Clause, they further claim that their actions are protected under the doctrine of qualified immunity. The court agrees.

The doctrine of qualified immunity generally shields government officials from liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). It safeguards "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs,* 475 U.S. 335, 341 (1986). Furthermore, qualified immunity should be determined at the earliest possible stage in the litigation, to spare the defendants the burden of proceeding to an unnecessary trial. *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001).

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[19] Plaintiffs do not appear to raise any claims against Castro based on any actions taken in her individual capacity, and, in fact, did not discuss any such claims either in their papers or at the oral argument.

Under *Saucier*, the court is required to conduct a two-step analysis of claims for qualified immunity. First, the court must determine if, as a matter of law, the Eklunds have demonstrated a violation of their constitutional rights. If so, the defendants may be immune from liability if they can show that the right at issue was not "clearly established" at the time the alleged violation occurred, such that reasonable school officials would have believed their actions to be lawful. *Saucier*, 533 U.S. at 202; *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982). *See also Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 983 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 78 (2003).

Here, based on the undisputed facts of record, defendants could reasonably have believed that the Islam simulation module and its accompanying written materials were constitutional. *Brown* clearly holds that role-playing activities that simulate religious activity constitute neither the practice of religion for the purposes of *Lee* nor an endorsement of religion under *Lemon*, 27 F.3d at 1380-82, and defendants point to no subsequent cases demonstrating otherwise. Furthermore, Supreme Court cases since *Abington Township* have held that religion may properly be taught in the schools in a secular and pedagogical context, as defendants were doing here. Given the status of the law at the time that Chase and Samantha were enrolled in the seventh grade, the defendants acted reasonably in their use of the Islam simulation module, and even if a constitutional violation had been found, qualified immunity would exempt the defendants from liability in any event.

CONCLUSION

The court rules as follows:

Summary judgment is GRANTED in favor of the defendant school district and defendant Superintendent Green under the Eleventh Amendment.

Summary judgment is GRANTED as to defendant Carlin and DENIED as to plaintiff Chase Eklund and his parents. Summary judgment is GRANTED as to defendant Carr and DENIED as to Samantha Eklund and her parents. Summary judgment is GRANTED as to Castro and DENIED as to all plaintiffs.

Summary judgment is thus GRANTED in favor of all defendants and against all plaintiffs, on nominal damages claims only. All equitable claims against defendants are dismissed as moot.

This order fully adjudicates the matters listed at nos. 63 and 76 on the clerk's docket for this case, and all other pending matters. The clerk is ordered to close the file.

IT IS SO ORDERED.

Dated: December 5, 2003

/s/ Phyllis J. Hamilton
PHYLLIS J. HAMILTON
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JONAS EKLUND, et al.,

Plaintiffs,

v.

BYRON UNION SCHOOL DISTRICT, et al.,

Defendants. /

No. C 02-3004 PJH

JUDGMENT

(Filed Dec. 5, 2003)

This action came on for hearing before the court and the issues having been duly heard and the court having granted defendants' motion for summary judgment,

It is Ordered and Adjudged

that the complaint is dismissed with prejudice.

IT IS SO ORDERED.

Dated: December 5, 2003

/s/ Phyllis J. Hamilton
PHYLLIS J. HAMILTON
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JONAS EKLUND, et al., Plaintiffs, v. BYRON UNION SCHOOL DISTRICT, et al., Defendants. /	No. C 02-3004 PJH ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT TO DISMISS DUPEE DEFENDANTS

Defendants' motion for summary judgment came on for hearing on September 17, 2003 before this court. Plaintiffs appeared by their counsel, Edward White, and defendants appeared by their counsel, Linda Lye and Stephen Berzon. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, the court hereby rules as follows, for the reasons set forth at the hearing.

BACKGROUND

This case involves two families, the Eklunds and the DuPees, who claim that the Byron Union School District's seventh grade world history Islam simulation unit, utilized by some teachers of the Excelsior Middle School, violates the First Amendment establishment clause. The District now moves for summary judgment in its favor, claiming that the members of the DuPee family lack standing.

Plaintiff Heather Mathisen is the mother of plaintiffs Morgan and Taylor DuPee.[1] This school year (2003-04), Taylor will begin fifth grade and Morgan will begin fourth grade at Discovery Bay, which is one of the two elementary schools in the Byron Union school district. Taylor is not expected to begin the seventh grade at Excelsior until at least the 2005-06 school year, and Morgan will not until 2006-07. For the purposes of this motion, all parties appear to presume that the DuPee children will definitely enroll in Excelsior, which is the only middle school in the district.

The Islam simulation is not a required unit of the seventh grade world history curriculum; rather, the world history teachers independently decide whether they will incorporate that unit into their lesson plans. Castro Decl. ¶ 18. For example, out of the three world history teachers currently teaching at Excelsior, only one teacher, Michele Carr, has indicated any potential intention to use the Islam simulation unit this school year.[2] *Id.* ¶¶ 20-22 (Carr

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[1] Morgan and Taylor's father, Jay DuPee, was previously also a plaintiff, but was later voluntarily dismissed from the case on May 14, 2003. Mathisen was originally named in this lawsuit as Heather DuPee, *see* Complaint, and then changed her name to Heather Sloan in the filing of the April 23, 2003 First Supplemental Complaint. On August 4, 2003, the parties stipulated that Sloan had remarried and changed her name to Heather Mathisen. For convenience, Mathisen and her two daughters will be referred to collectively as "the Dupees."

[2] When plaintiff Chase Eklund was in the seventh grade, for the 2001-02 school year, one teacher, Brooke Carlin, used portions of the Islam simulation unit in world history. At that time, Carlin was the only seventh grade world history teacher. Carlin now teaches eighth grade U.S. history and it is unlikely she will be reassigned to teach seventh grade world history. In 2002-03, when plaintiff Samantha Eklund was in the seventh grade, the District had two world history

(Continued on following page)

has not at this time definitely decided whether she will use the Islam unit, but the other two world history teachers definitely will not). Given classroom reassignments, anticipated new teacher hires due to the growing population in the District, possible teacher turnover at Excelsior, and the school's policy of random assignment of students to teachers, it is impossible at this point to determine whether any teacher will be using the Islam simulation unit when the DuPee children enter the seventh grade, and, if so, whether the children would in fact be assigned to such a teacher. *Id.* ¶¶ 6-13, 25.

ANALYSIS

A. Legal Standard – Summary Judgment

Summary Judgment is appropriate when the evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

B. Standing

To establish standing, the DuPees must demonstrate that:

> "1) [they] have suffered an 'injury in fact' that is a) concrete and particularized and b) actual or imminent, not conjectural or hypothetical; 2) the injury is fairly traceable to the challenged action of the defendant; and 3) it is likely, as opposed to

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teachers, and only one teacher, Carr, used the Islam simulation unit. Castro Decl. ¶¶ 11, 21-24.

> merely speculative, that the injury will be redressed by a favorable decision."

Newdow v. U.S. Congress, 328 F.3d 466, 484-85 (9th Cir. 2003), *pet for cert. filed*, 71 U.S.L.W. 3708 (Apr. 30, 2003) (No. 02-1574, *citing, inter alia*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)[3] To proceed in the case, the plaintiffs must have had standing as of the time the complaint was filed. *See, e.g.*, *Lujan*, 504 U.S. 569 n. 4. Furthermore, the plaintiffs bear the burden at all times of demonstrating that they have standing to pursue this lawsuit. *Scott v. Pasedena Unified Sch. Dist.*, 306 F.3d 646, 655 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 2071 (2003) (citations omitted).

To demonstrate an injury in fact sufficient to create standing, the DuPees must show that they have a sufficient "personal stake" in the case by demonstrating that they have "sustained a concrete injury, distinct and palpable as opposed to merely abstract," and that the injury in question has "actually occurred or must occur imminently; hypothetical, speculative, or other possible future injuries do not count in the standings calculus." *Schmier v. United States Ct. of Appeals for the Ninth Cir.*, 279 F.3d 817, 821 (9th Cir. 2002) (citations omitted); *see also Scott*, 306 F.3d at 657 (plaintiff must demonstrate "genuine threat of adverse treatment" directly caused by the program at issue and must "concretely establish that . . . specific harm will likely befall [each] specific plaintiff" to show standing for injunctive relief).

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[3] Since Mathisen's taxpayer claims were dismissed from the case on June 6, 2003, all her remaining claims in this action are brought solely in her capacity as the next friend of her children, and therefore her rights are coextensive with theirs.

Here, the DuPees cannot demonstrate anything more than a hypothetical likelihood that the DuPee children will be subjected to the Islam simulation unit. At this time, the District does not know who will be teaching seventh grade world history for the school years of 2004-2005 and 2005-2006, how those teachers will structure their curriculum, or to which teachers the DuPee children may be assigned. This is insufficient to demonstrate "facts showing, with specificity, that the [challenged action] will produce an imminent injury personal to [plaintiffs] themselves." *Schmier*, 279 F.3d at 821 (challenge to Ninth Circuit's ban on the citation of unpublished decisions failed for lack of standing because plaintiff attorney failed to demonstrate any immediate and personalized harm to himself or his clients due to policy; "the Supreme Court has flatly rejected the contention . . . that an injury occurring 'some day' can satisfy the injury-in-fact requirement of the standing doctrine); *see also Cole*, 228 F.3d at 1100 (challenge to policy banning sectarian speeches and prayer in high school graduation speeches brought by persons who had not yet attended a graduation ceremony but were likely to do so in the future failed for lack of standing because "the likelihood that they will suffer a future injury depends on the highly speculative assumption that a student seeking to give a secretarian speech or prayer will [be selected to speak]," and determining that "this threat of injury is neither real nor immediate."); *c.f. Scott*, 306 F.3d at 657-58 (challenge to proposed school desegregation policy on 14th Amendment grounds by plaintiffs who had not previously applied to the schools at issue but who remained eligible to apply at the time the lawsuit was filed failed for lack of standing because no facts had been alleged that the desegregation policy would in fact ever be put in place).

The DuPees respond that they have standing to proceed because the Islam simulation unit is used within the school district in which the DuPee children are currently enrolled, and it is possible that any seventh grade world history teacher within the district may choose to use the Islam simulation unit. It is true that students may be found to have standing to enjoin their school district's school – or district-wide policies, since the students as members of the school or district will necessarily be subject to the policy's terms. *See, e.g., Newdow*, 328 F.3d at 485 (plaintiff had standing to challenge the Pledge of Allegiance policy of the school district in which his daughter was currently enrolled); *Lee v. Weisman*, 505 U.S. 577 (1992) (plaintiff presumed to have standing to challenge prayer during school-wide graduation ceremonies throughout the district in which all students were in effect compelled to attend). However, the District does not require all of its students to participate in the Islam simulation unit, and in fact, does not even require participation in the Islam simulation for all of its seventh grade students. Only students enrolled in seventh grade world history classes taught by teachers who choose to use the Islam simulation unit are required to determine whether they will or will not participate in the exercise.

The Islam simulation unit, thus, cannot be considered a district-wide event in which all students will be compelled to participate. In that circumstance, only students who can demonstrate that they will personally be subjected to the activity in question will have standing to bring a claim. *See, e.g., Cole*, 228 F.3d at 1100 (future graduation attendees lacked standing to enjoin school policy banning sectarian graduation speeches because it was too speculative to assume at the time of suit that the

proposed plaintiffs would in fact attend an graduation ceremony at which a student speaker would request to give a sectarian speech); *Roberts v. Madigan*, 921 F.2d 1047, 1052 (10th Cir. 1990) (in context of challenging a school district's ban on an individual 5th grade teacher's reading the Bible in class, no standing for proposed plaintiffs who were not yet old enough to be enrolled in teacher's class because they had not suffered any "distinct and palpable injury" from the ban); *see also Fisher v. Tucson School Dist.*, 625 F.2d 834, 837 (9th Cir. 1980) (in context of 14th amendment claim, merely being enrolled in a school district, by itself, was not enough to confer standing to challenge a school desegregation plan absent any indication that plaintiffs had in fact been subjected to impermissible categorizations). Since the DuPees cannot demonstrate with sufficient certainty that they will necessarily be subjected to the Islam simulation unit as of the time the complaint was filed, their claims fail for lack of standing.

C. Ripeness

Also, the courts may only review ripe questions. The ripeness doctrine is "designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138-39 (9th Cir. 2000), *cert. denied*, 531 U.S. 1143 (2001) ("Our role is neither to issue advisory opinions nor to declare rights in hypothetical cases, but to adjudicate live cases or controversies consistent with the powers granted the judiciary in Article III of the Constitution . . . and from prudential reasons for refusing to exercise jurisdiction") (citations omitted).

While the constitutional elements of the ripeness inquiry are often coextensive with those of Article III standing, *see Thomas*, 220 F.3d at 1138 (describing ripeness as "[Article III] standing on a timeline"), the court must examine prudential elements in its ripeness inquiry as well. "In evaluating the prudential aspects of ripeness, our analysis is guided by two overarching considerations: the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 1141 (citations omitted). A claim is thus considered ripe for review only "if the issues raised are primarily legal, do not require further factual development, . . . [and] withholding review would result in direct and immediate hardship" to the plaintiff. *Winter v. California Medical Review, Inc.*, 900 F.2d 1322, 1325 (9th Cir. 1990).

The parties are currently unable to determine whether the DuPees will ever be enrolled in a seventh grade world history class using the Islam simulation unit, and if so, what elements of the unit will be utilized, because the facts have not yet fully developed. This is an indication that the case is not yet ripe for review. *Thomas*, 220 F.3d at 1141 (requiring a "concrete factual situation" for review; denying review on ripeness grounds of a statute barring housing discrimination based on marital status when proposed plaintiffs had not yet actually denied persons housing on that basis and government had not indicated any intention to charge plaintiffs with such a violation "t]his case is a classic one for invoking the maxim that we do not decide constitutional questions in a vacuum.") (citations omitted); *Scott*, 306 F.3d at 663 (finding case unripe for review because it was still unclear whether

the challenged desegregation policy would in fact be put in place).

Furthermore, since the parties have not yet been subjected to any potential First Amendment violations from the Islam simulation unit, there is no hardship in declining to rule now. *Thomas*, 220 F.3d at 1142 (absence of an imminent injury "seriously undermines any claim of hardship," and pointing out that the defendant would in fact suffer hardship in having to litigate a case with no facts and no injured parties).

Here, since the DuPees' claims concerning their potential seventh grade world history curriculum "rest[] upon contingent future events that may not occur as anticipated, or indeed may not occur at all," they are not yet ripe for review and on a prudential basis, must be dismissed on this basis as well. *Scott*, 306 F.3d at 662 (citations omitted).[4]

Thus, defendants' motion for summary judgment to dismiss the DuPee defendants (Morgan and Taylor DuPee and their mother, Heather Mathisen) is GRANTED. This order fully adjudicates the matter listed at no. 47 on the clerk's docket for this case.

IT IS SO ORDERED.

Dated: September 18, 2003 /s/ Phyllis J. Hamilton
PHYLLIS J. HAMILTON
United States District Judge

[4] This dismissal is without prejudice, so if the DuPees subsequently obtain standing to proceed while the case is pending, they may then reenter the case.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JONAS EKLUND, et al., Plaintiffs, v. BYRON UNION SCHOOL DISTRICT, et al., Defendants. /	No. C 02-3004 PJH ORDER GRANTING SUMMARY ADJUDICATION ON FOURTH CAUSE OF ACTION

Before this court are plaintiffs' reply to the court's May 22, 2003 order to show cause why summary judgment should not be granted on Samantha Eklund's free exercise claim, and defendants' response to plaintiffs' reply. Having carefully read the parties' papers and considered the relevant legal authority, the court hereby rules as follows.

In response to the court's order to show cause, plaintiffs request that summary judgment be postponed on Samantha Eklund's free exercise claim, the fourth cause of action in the supplemented complaint, to permit additional discovery. Plaintiffs, however, previously raised this issue in the context of a request to continue the previous summary judgment motion on the free exercise claims under Fed.R.Civ.P. 56(f). *See* March 12, 2003 Order at 5 (denying 56(f) request for failure to meet procedural requirements). Thus, as the court indicated in its May 22 order to show cause, this request will be viewed as a request for leave to file a motion for reconsideration on this issue.

Plaintiffs fail to demonstrate any grounds under Civ.L.R. 7-9 warranting reconsideration of the court's previous decision dismissing Samantha Eklund's free

exercise claim. Accordingly, the request for leave to file a motion for reconsideration is DENIED, and summary judgment on the fourth cause of action is GRANTED.

This order fully adjudicates the matter listed at no. 40 on the clerk's docket for this case.

IT IS SO ORDERED.

Dated: June 17, 2003 /s/ Phyllis J. Hamilton
PHYLLIS J. HAMILTON
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JONAS EKLUND

Plaintiffs,

v.

BYRON UNION SCHOOL DISTRICT, et al.,

Defendants. /

No. C 02-03004 PJH

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

(Filed Mar. 12, 2003)

Defendants' motion for judgment as a matter of law or, in the alternative, for summary judgment came on for hearing on March 5, 2003 before this court, the Honorable Phyllis J. Hamilton presiding. Plaintiffs appeared through their counsel Robert Muise and defendants appeared through their counsel Linda Lye. Having read the papers and carefully considered the relevant legal authority, the court hereby rules as follows for the reasons stated at the hearing.

BACKGROUND

Tiffany and Jonas Eklund, their children Chase and Samantha, and Jay and Heather DuPee and their children Morgan and Taylor (collectively, "the Eklunds"), have sued the Byron Union School District and various school administrators, claiming that a unit in the Byron Union 7th grade world history class at Excelsior School on Islam violates their First and Fourteenth Amendment rights.[5]

[5] Defendants include the school district, the district superintendent, the school principal Nancie Castro, and Chase's 7th grade world

(Continued on following page)

The 7th grade world history class at Excelsior includes a unit on Islam in the fall semester. The class utilizes materials entitled "Islam: A simulation of Islamic history and culture," which seek to engage students in the subject matter through role-play and competition. *See generally* Complaint Exh. A (Islam unit materials).

In the class, the students are broken up into groups named after six Islamic cities. The premise of the Islam unit is that the students pretend to make a pilgrimage, or hajj, from their designated city to Mecca. Along the "travel route," the children learn an overview of Islamic geography and history, and are exposed to various aspects of Islamic culture, including religion, dress, cuisine, art, and poetry. Complaint Exh. A at 1:12-13.[6] "Progress" towards Mecca is measured in points, which can be gained, among other ways, by doing well on quizzes, active participation in role-play, bartering with other groups, and completing culturally-themed group projects. *Id.*

Chase Eklund participated in the Islam unit last year. He and his parents object to various aspects of the Islam unit, including the fact that the student handouts encouraged students to "become Muslims," that he was asked to

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history teacher, Brooke Carlin. Chase is now in 8th grade for the 2002-2003 school year. Complaint ¶¶ 11, 20. Chase's sister Samantha, is currently a 7th grader enrolled in world history, and her teacher is Michele Carr. S. Eklund Decl. ¶ 1. Carr has not been named as a defendant in the lawsuit. All parties are sued in their official capacity, and Castro and Carlin have been sued in their individual capacity as well.

[6] The parties do not address whether all of the classroom activities suggested in the Islam simulation teacher's manual were actually used at Excelsior School in fall 2001 and 2002, though the parties agree that at least some of the material was.

participate in a simulated hajj, that he was asked to choose a Muslim name, that he was encouraged to use Muslim religious phrases such as "in sha Allah" (God willing) and "Allah Akbar" (God is great), that he learn Muslim prayers and read translations of the Koran, that he fast, and that he learn about the Islamic faith. Complaint ¶¶ 26-37; *see also* Complaint Exh. A at 1:12. The complaint does not state whether Chase made any objections to school officials during the fall 2001 semester about the unit, but the Excelsior principal and Chase's teacher state that he did not. Castro Decl. ¶ 6; Carlin Decl. ¶ 4. Two other students in Chase's class did object, and were excused from participation. Castro Decl. ¶ 5; Carlin Decl. ¶¶ 5-7.

This fall, Samantha Eklund's 7th grade class began the same Islamic unit in world history.[7] Samantha, through her mother Tiffany, requested to opt out of the assignment. S. Eklund Decl. ¶ 2; T. Eklund Decl. ¶ 5; Carr Decl. ¶ 6, Exh. B. Samantha claims that her teacher became angry when she opted out of the assignment, and she was embarrassed when leaving the class. S. Eklund Decl. ¶ 2. Samantha was given an alternate world history assignment for over a month, which was to read a chapter of the textbook on the French Revolution without teacher supervision. *Id.* ¶ 3. Samantha was then tested on this material, and failed. *Id.* Samantha and her mother Tiffany

[7] Samantha's participation in the Islam unit occurred this fall, after the filing of the complaint in July 2002, so her allegations are not included in the complaint. Plaintiffs have not indicated whether they intend to supplement their complaint to add these claims, and instead provide all information concerning Samantha in declarations.

contend that students who participated in the Islam unit were not tested on this chapter. *Id.*; T. Eklund Decl. ¶ 7.

The school district has an opt-out policy where parents who object to instructional materials may excuse their children from participation. Castro Decl. Exh. A (policy in place at least as of June 1998). The Eklunds claim they did not know about the opt-out before the start of the 2001-2002 school year. T. Eklund Decl. ¶ 3; Complaint ¶ 23.[8] They also claim that no school officials told them that Islam was to be studied in school, and that they were not asked to consent to their children taking this course before the course began. T. Eklund Decl. ¶3; Complaint ¶ 24.

The Eklunds and the DuPees allege that the 7th grade world history class is practicing the Islamic religion and request that the school stop offering the Islam unit.[9] The school district now moves for judgment on the pleadings or summary judgment on the second and third causes of action, for violations of the First Amendment free exercise

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[8] The Eklunds do not allege when they learned about the district's opt-out policy though the Eklunds concede that Samantha opted out of the Islam unit this semester. At oral argument, the Eklunds' counsel claimed that the Eklunds did not learn about the opt-out policy until after Chase had completed the Islam unit.

[9] Chase and Samantha Eklund have now completed the 7th grade world history unit at Excelsior School. The DuPee children are in 3rd and 4th grade, at a different school in the Byron Union school system, this school year, but anticipate that they will attend Excelsior for middle school. Complaint ¶¶ 15, 16. The DuPees raise no arguments in this motion. Neither plaintiffs nor defendants raise in this motion any issues of mootness, ripeness, or standing, though plaintiffs stated at oral argument that they believed that their nominal damages claims and taxpayer standing allegations formed a sufficient basis for the case to continue.

clause and the Eklunds' parental rights, as well as on certain procedural issues.[10]

DISCUSSION

A. Legal Standards

1. Rule 12(c) and Summary Judgment

Judgment on the pleadings under Fed. R. Civ. P. 12(c) is appropriate after an answer has been filed and the complaint fails to state a cause of action upon which relief can be granted. *See, e.g., Smith v. Nat'l Steel & Shipbuilding Co.*, 125 F.3d 751, 753 (9th Cir. 1997).

2. Conversion of 12(c) Motion to Summary Judgment Motion

A motion for judgment on the pleadings may be converted into a motion for summary judgment at the court's discretion. Fed. R. Civ. P. 12(c); *see also Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9th Cir. 1989). To do so, the parties must be "fairly apprised" that the court intends to consider extrinsic evidence and apply the summary judgment standard of review. *Portland Retail Druggists Assoc. v. Kaiser Foundation Health Plan*, 662 F.2d 641, 645 (9th Cir. 1981) (conversion of 12(b)(6) motion into motion for summary judgment).

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[10] The first cause of action, for violations of the First Amendment establishment clause, is not at issue in this motion.

Here, where both parties have submitted extensive extrinsic evidence, the court finds there is adequate notice to consider the motion as one for summary judgment.

3. Summary Judgment

Summary judgment is appropriate when the party moving for summary judgment demonstrates that the evidence shows no genuine issue of material fact and that the party is thus entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Questions of law that turn on the legal significance of undisputed facts may properly be decided on a motion for summary judgment. *See, e.g., Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1523 (9th Cir. 1994).

B. Rule 56(f) Request

The Eklunds argue that they need additional discovery before the court can enter summary judgment. This request is construed as a motion under Fed. R. Civ. P. 56(f).

To bring a 56(f) motion, the Eklunds must submit a declaration indicating what facts are essential to justify its opposition. The declaration should include a particularized explanation of what information is needed, why that information is essential to the Eklund's case, why the Eklunds lack the necessary information, and the steps that the Eklunds intend to take to obtain that information. *State of Calif. v. Campbell*, 138 F.3d 772, 779 (9th Cir. 1998) (merely stating that additional discovery is needed is insufficient). Because the Eklunds have neither submitted such declarations nor provided this particularized

explanation in their brief, the request for additional discovery is denied.

C. First Amendment and Free Exercise Claims

1. Legal Standard

The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . " U.S. Const. amend. I. The first clause is known as the Establishment Clause and the second as the Free Exercise Clause.

"The free exercise clause recognizes the right of every person to choose among types of religious training and observance, free of state compulsion. To establish a violation of that clause, a litigant must show that challenged state action has a coercive effect that operates against the litigant's practice of his or her religion." *Grove v. Mead School Dist. No. 354*, 753 F.2d 1528, 1533 (9th Cir. 1985); *citing School District of Abington Township. Penn. v. Schempp*, 374 U.S. 203, 223 (1963) (emphasis added).[11] In other words, the student must have no option other than to participate in activities offensive to their (or their parents') religious beliefs. *See Lyng v. Northwest Indian Cemetary Protective Assoc.*, 485 U.S. 439, 449 (1988) (violation of free exercise clause when party forced by state to violate religious principles); *Bauchman v. West High*

[11] This differs from the standard used in determining an establishment clause, violation, which does not require a showing of coercion. *Abington*, 374 U.S. at 223; *see also Engel v. Vitale*, 370 U.S. 421, 430 (1962) ("The Establishment Clause, unlike the Free Exercise clause, does not depend upon any showing of direct governmental compulsion.").

Sch., 132 F.3d 542, 557 (10th Cir. 1997) (no free exercise claim when student could opt out of potentially-offensive activity).

To determine whether the school district has violated the Eklunds' free exercise rights by using the Islam unit and refusing to remove it from the world history curriculum, the court considers:

> 1) the magnitude of the [school district policy's] impact on the exercise of the Eklunds' religious beliefs;
>
> 2) the existence of a compelling state interest justifying the burden imposed upon the exercise of the religious belief; and
>
> 3) the extent to which recognition of an exemption from the [school district's policy] would impede the objectives sought to be advanced by the state.

Callahan v. Woods, 736 F.2d 1269, 1273 (9th Cir. 1984).[12]

2. Coercion

A finding of coercion for a free exercise claim is defeated if the offended party has the right to opt out of the activity in question. *See Grove*, 753 F.2d at 1533 (no free exercise claim stated when high school sophomore was permitted to opt out from reading book alleged to be

[12] The Religious Freedom Restoration Act may have briefly superseded the standard, in that it required the state to show a compelling reason for a substantial burden on a person's religion, but the Religious Freedom Restoration Act was subsequently found unconstitutional. *City of Bournes v. P.F. Flores*, 521 U.S. 507 (1997). Therefore the *Callahan* test may now again be applied.

religiously offensive); *Bauchman*, 132 F.3d at 557 (no free exercise claim stated when Jewish student could have refused to participate in the high school choir, which performed Christian devotional music); *Altman v. Bedford Central Sch. Dist.*, 245 F.3d 49, 80 (2d Cir. 2001), *cert. denied*, 534 U.S. 827 (2001) (no free exercise claim stated when students could skip allegedly-offensive Earth Day activities).[13] The school district has had its current opt-out procedure in place since 1996, and opt-out requests are routinely granted. Castro Decl. Exh. A, ¶¶ 3, 5, 8, 9. Thus, students are not compelled to participate in the Islamic simulation unit.[14]

Chase did not opt out of the Islam unit. The Eklunds claim he was in effect coerce into completing the Islam unit because they did not know that an opt-out option existed at

---

[13] The Eklunds claim that the activities at issue in this case are more religious offensive than the challenged activities in *Grove*, and therefore *Grove's* legal standard should not apply. This court declines to analyze the sincerity or depth of Grove's subjective religious beliefs and subsequent offense. *See Grove*, 753 F.2d at 1535 ("The sincerity of plaintiffs' religious objections to [the textbook in question] is not disputed, nor is the fact that the book deeply offends plaintiffs.") (Canby, J. concurring). For this reason, "antipathy alone however sincere, is never enough to sustain a free exercise challenge." *Id.* at 1542 (citation omitted).

[14] The Eklunds also claim they should have received advance notice of the Islam unit and that the school preferably should have required parental permission (as an "opt-in" before beginning the unit. The school, however, is not required to give advance notice of potentially-offensive material to comply with the free exercise clause requirements. *Grove*, 753 F.2d at 1533 (sufficient that student exempted out when book was actually assigned in class). In any event, it appears as if the Eklunds in fact received advance notice, at least as to Samantha's world history class. Carr Decl. Exh. A (email from Eklunds to Samantha's world history teacher about the Islam unit stating, "We are concerned about the *next unit*." (emphasis added).

that time. None of the cases require that parents or students be informed of an opt-out policy, only that the student in fact be able to opt out upon request. *See, e.g., Grove*, 753 F.2d at 1533, 1542 n. 27 (only relevant factor for free exercise claim that Grove was permitted to opt out, even though she chose to remain in the class for discussions); *see also* Castro Decl. ¶ 5 (two students in Chase's world history class were permitted to opt of the Islam unit); Carlin Decl. ¶¶ 5-7 (same). For the purposes of a free exercise claim, Chase was not compelled to participate in the Islam unit.

As for Samantha, the Eklunds concede that she was able to opt out of the unit, but argue that she faced ostracism for having done so and therefore suffered coercion to stay in class.[15] While this type of subtle coercion may be sufficient to state a claim under the establishment clause, *see, e.g., Lee v. Weisman*, 505 U.S. 577, 588 (1992) (students suffer "subtle coercive pressure" to attend high school graduation for establishment clause purposes, even though technically, students are not required to participate), it is not for a free exercise claim. *See Engel v. Vitale*,

[15] The Eklunds also argue that Samantha was in effect penalized for opting out the Islam unit because she failed the world history unit she was assigned as an alternative to completing the Islam unit. T. Eklund Decl. ¶ 7. This argument does not follow. Samantha was not penalized for opting out of the Islam unit; she was penalized for her poor performance on the alternate assignment. The school district need only provide another option for Samantha to fulfill the requirements for 7th grade world history to meet its obligations under the Free Exercise clause. *Grove*, 753 F.2d at 1533 (assignment of alternate reading without removing allegedly-offensive material from curriculum sufficient to satisfy First Amendment concerns). It is not required to automatically grant Samantha a passing grade on the alternate assignment if she has not met the requisite standards.

370 U.S. 421, 430-31 (1962) ("subtle coercive pressures" alone not enough to create a free exercise claim if opt-out procedure is available); *Bauchman*, 132 F.3d at 546, 555, 557 (if opt-out is possible, suffering ostracism as a result of dissent insufficient to state free exercise claim); *see also Grove*, 753 F.2d a 1543 n. 30 (Canby, J. concurring; alleged ridicule from classmates and statement by teacher that student interpreted as negative not considered coercive for purposes of free exercise analysis). Samantha suffered no coercion under the free exercise clause to participate in the Islam unit.

3. *Callahan* Balancing Test

Thus, to determine whether a Free Exercise claim has been stated, the court applies the *Callahan* balancing test. 736 F.2d at 1273.

a. Magnitude of Policy on Beliefs

Because Chase and Samantha were able to opt out of the Islam unit, the impact of the unit on their religious beliefs is minimal. *Grove*, 753 F.2d at 1533 (opting out eliminates coercive element of classroom activity; lack of coercion creates minimal impact on beliefs).

b. Compelling State Interest

The state has a compelling interest in providing a well-rounded public education. *Grove*, 753 F.2d at 1533; *see also Wisconsin v. Yoder*, 406 U.S. 205, 213 (1974) ("Providing public education ranks at the very apex of the function of a State").

c. Impediment of State's Objectives

The state's objectives would be severely hampered by granting the Eklunds their requested relief. In the absence of coercion, forcing a school to eliminate potentially-objectionable material from its curriculum poses a "critical threat to public education." *Grove*, 753 F.2d at 1533. "If we are to eliminate everything that is objectionable to any of the religious bodies existing in the United States or inconsistent with any of their doctrine: we will leave public education in shreds." *Id.*, *citing*, *inter alia*, *McCollum v. Board of Educ.*, 333 U.S. 203, 235 (1948) (Jackson, J. concurring). *See also*, *e.g.*, *Fleischfresser v. Directors of Sch. Dist. 200*, 15 F.3d 680, 689-90 (7th Cir. 1994) (state's interests in encouraging students to read and use imagination in public schools outweighs even a substantial burden on free exercise rights); *Florey v. Sioux Falls Sch. Dist. 49-5*, 619 F.2d 1311, 1318 (8th Cir. 1980) ("The public schools are not required to delete from the curriculum all materials that may offend any religious sensibility.").[16]

Thus, since the Eklunds fail to demonstrate a sufficiently coercive effect of the Islam unit to justify its removal from the public school curriculum on Free Exercise grounds, summary judgment on the second cause of action is granted.

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[16] The school district also points out that removing an otherwise-proper Islam unit solely based on the Eklunds' religious objections would violate the Establishment Clause. *Epperson v. Arkansas*, 393 U.S. 97, 106-07 (1968); *see also Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1064 (6th Cir. 1987) ("it violates the Establishment Clause to tailor a public school's curriculum to satisfy the principles or prohibitions of any religion").

D. Parental Rights

1. Legal Standard

The due process clause of the Fourteenth Amendment "protects the liberty of parents and guardians to direct the upbringing and education of children under their control." *Hooks v. Clark County Sch. Dist.*, 228 F.3d 1036, 1041 (9th Cir. 2000), *cert. denied*, 532 U.S. 971 (2000), *citing Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925). *See also Nunez v. City of San Diego*, 114 F.3d 935, 951 (9th Cir. 1997) ("The right to rear children without undue governmental interference is a fundamental component of due process," *citing Ginsberg v. New York*, 390 U.S. 629, 639 (1968)). This is known as the doctrine of "parental rights."[17]

Regulations that affect parental rights will be upheld as a matter of substantive due process if the regulation is merely "reasonable." *Hooks*, 228 F.3d at 1041 (adopting lowest standard of due process review for parental rights claim) (citations omitted). As for an equal protection claim, the government need only meet the "rational basis" standard to prevail. *Id.* at 1042 (classification will be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for it").

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[17] One aspect of the parental rights doctrine is "the right to control the religious upbringing and training of their minor children." *Grove*, 753 F.2d at 1531. This right is considered coextensive with the children's free exercise claim under the First Amendment is analyzed on the same basis. *North Valley Baptist Church v. McMahon*, 696 F. Supp. 518, 537 (E.D. Cal. 1988), *aff'd*, 893 F.2d 1139 (9th Cir. 1990). To the extent the parental right doctrine is based on this principle, it is dismissed on the same grounds as the free exercise claims.

2. Rational Review

Under *Hooks*, the school's curriculum need only be reasonable and pass rational review to survive a parental rights claim. 228 F.3d at 1041-42. Here, the school district's objective – to teach children about Islamic history and culture – is legitimate, and deciding to use an interactive method is a reasonable and rational way to further that objective. *See, e.g.*, Complaint Exh. A at 1:1 (objectives of the Islam simulation unit to teach cultural historical, geographical, and contemporary awareness); Carr Decl. Exh. A (describing the Islam program as designed to "engage the students and convey the materials in a more effective manner than passive, non-participatory teaching methods might otherwise accomplish," and stating that she uses the materials to "enhance learning.").[18] Thus, the parental rights claim may be dismissed as a matter of law.

The Eklunds further complain that their parental rights were violated when the school failed to give them advance notice of use of the Islam unit.[19] The school is not required to do so. The doctrine of parental rights does not create "a fundamental constitutional right to dictate individually what the schools teach their children." *Brown v. Hot Sexy and Safer Prod.*, 68 F.3d at 525, 529, 534 (1st Cir. 1995) (failure to provide advance notice of a sexually-explicit presentation on AIDS awareness did not violate parental rights; "the rights of parents . . . do not encompass a

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[18] The defendants have not disputed the school's stated objectives for inclusion of the Islam unit in the world history curriculum.

[19] This assumes that the Eklunds did not in fact receive advance notice of the Islam unit. *But see* Carr Decl. Exh. A (Eklunds' email to Samantha's teacher stating "We are concerned about the next unit," concerning the Islam unit) (emphasis added).

broad-based right to restrict the flow of information in the public schools.").

D. Hybrid Rights Claim[20]

In *Employment Division v. Smith*, the Supreme Court held that strict scrutiny of an otherwise-neutral regulation could potentially apply to a parental rights claim that was coupled with a free exercise claim. 494 U.S. 872, 881 (1990), *citing, inter alia, Wisconsin v. Yoder*, 406 U.S. 205. To state a hybrid-rights claim under the free exercise clause, the Eklunds must make out a "colorable claim that a companion right has been violated." *Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999) (citations omitted). A "colorable claim" is shown by demonstrating "a fair probability or a likelihood, but not a certitude, of success on the merits." *Id.*

Thus, the Eklunds may only state a hybrid rights claim if they can show a colorable parental rights claim on that issue. Since they cannot, the hybrid rights claim also necessarily fails.

E. § 1983 Claims and Damages Claims

All parties agree that the causes of action in this litigation are stated solely under 42 U.S.C. § 1983. *Azul-Pacifico v. City of Los Angeles*, 973 F.2d 704, 705 (9th Cir. 1992).

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[20] While the school district discussed this point briefly in its opening papers, the Eklunds did not affirmatively raise the issue until oral argument.

The parties also agree that no nominal damages are stated against the school district or any other persons sued in their official capacity. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 69 (1997); *see also Belanger v. Madera Unified Sch. Dist.*, 963 F.2d 248, 254 (9th Cir. 1992) (Eleventh Amendment bars damages claims against California school districts).

Defendants' motion for summary judgment on the second and third causes of action is GRANTED. This order fully adjudicates the matter listed at no. 24 on the clerk's docket for this case.

IT IS SO ORDERED.

Dated: March 12, 2003

/s/ Phyllis J. Hamilton
PHYLLIS J. HAMILTON
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JONAS EKLUND; TIFFANY EKLUND, both individually and as next friends of Chase Eklund, a minor and Samantha Eklund, a minor; HEATHER DUPEE, as next friend of Morgan Dupee, a minor, and Taylor Dupee, a minor,

Plaintiffs-Appellants,

V.

BYRON UNION SCHOOL DISTRICT; NANCIE CASTRO, individually and in her official capacity as the Principal of Byron/Excelsior Public School; BROOKE CARLIN, individually and in her official capacity as a teacher at Bryon/Excelsior Public School; THOMAS M. MEYER, Esq., in his official capacity as Superintendent of the Byron Union School District,

Defendants-Appellees.

No. 04-15032

D.C. No.
CV-02-03004-PJH

Northern District of California, San Francisco

ORDER

(Filed Feb. 1, 2006)

Before: D.W. NELSON, RAWLINSON, and BEA, Circuit Judges.

The Panel has voted to deny the petition for rehearing. Judges Rawlinson and Bea voted, and Judge D. Nelson recommended, to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote.

The petition for rehearing and rehearing en banc filed on December 8, 2005, is DENIED.

MOTION FILED
JUN 30 2006

(3)

No. 05-1539

In The
Supreme Court of the United States

JONAS EKLUND, et al.,

Petitioners,

vs.

BYRON UNION SCHOOL DISTRICT, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF AMERICAN CATHOLIC LAWYERS ASSOCIATION, INC., IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Supreme Court Rule 37.2(b), the American Catholic Lawyers Association, Inc., respectfully moves this Court for leave to file the attached *amicus curiae* brief in support of the Petitioners, Jonas Eklund, et al. The consent of the attorneys for the Petitioner has been obtained. The consent of the attorneys for the Respondents was requested, but there has been no response to the request.

The American Catholic Lawyers Association, Inc. (ACLA) is a not-for-profit religious organization dedicated to the defense of the rights of Catholics in America, particularly in the area of First Amendment liberties. ACLA attorneys have represented Roman Catholic public school students and their parents in civil rights claims against public school authorities who have violated the Free Exercise and Establishment Clauses by promoting non-Christian religions in the public schools.

ACLA's *amicus curiae* brief argues that unless there is a double standard for application of this Court's decision in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and this Court's precedents on the Establishment Clause in the public school context, respondents' "interactive module" requiring impressionable public school students effectively to *become* Muslims cannot stand. ACLA further contends that this case presents an ideal vehicle for this Court to make it clear that the school cases apply with equal force to public

school promotion of any and all religions, not just Christianity.

Respectfully submitted,

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June 30, 2006

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INTEREST OF *AMICUS*[1]

ACLA is a nonprofit religious organization dedicated to defending the religious and civil rights of Catholics by means of litigation, public discourse and debate. ACLA has engaged in religious liberties litigation on behalf of Catholic plaintiffs and defendants in courts across the nation, and has filed merits and/or *amicus* briefs in numerous venues, including the United States Supreme Court.

ACLA attorneys represented the successful (at the trial level) plaintiffs in the case of *Altman v. Bedford Central Sch. Dist*, 245 F.3d 49 (2d Cir. 2001), *cert. denied*, 534 U.S. 827 (2001), which the district court in this case has cited, and which raised issues quite similar to those presented here.

ACLA is gravely concerned about what it believes is a *de facto* double standard of Establishment Clause jurisprudence which has emerged in *Altman* and other similar cases, under which the overt promotion of non-Christian religions such as Islam and Hinduism in the public schools under the guise of "cultural education" is treated far more leniently than the merest suggestion of school promotion of the Christian religion.

ACLA believes that this case is the clearest example to date of promotion of a non-Christian religion by public school authorities, and that it presents an excellent vehicle to demonstrate that the strictures of the Establishment

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[1] No counsel for a party authored this brief in whole or in part. No person or entity aside from the American Catholic Lawyers Association, Inc. (ACLA), its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The ACLA has no parent corporation and no stock.

Clause in the public school arena apply equally to Christian and non-Christian creeds.

ACLA thus supports petitioners in their arguments for reversal of the Ninth Circuit's perfunctory unpublished opinion affirming the district court's dismissal of their claims concerning respondents' "interactive educational module," which engages impressionable students in the practices and tenets of Islam.

SUMMARY OF ARGUMENT

The Excelsior School, a middle school in the respondent Byron Union School District, actively promoted and endorsed the religion of Islam by means of an "interactive educational module" whose aim could not be more explicitly contrary to the Establishment Clause: "From the beginning [of this module] you and your classmates *will become Muslims.*" ER 1934, 2299. The "module" involved nothing less than the school-sponsored immersion of impressionable students in the ways and beliefs of Islam.

A "module" whose aim was that the students "will become Catholics" would not have been tolerated for a moment in the public schools. Unless there is, in fact, a double standard in this area of constitutional law, the defendants' Islam "module" must be struck down, and the Ninth Circuit's decision reversed.

ARGUMENT

THE ESTABLISHMENT CLAUSE PROHIBITS PUBLIC SCHOOL PROMOTION OF "ISLAM LITE," AS WELL AS "ISLAM CLASSIC."

A. The "endorsement" test.

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this Court enunciated its classic three-part test for determining whether state action violates the Establishment Clause. The challenged state action must (1) "have a secular legislative purpose," (2) have a "principal or primary effect . . . that neither advances nor inhibits religion," and (3) "not foster an excessive government entanglement with religion." *Lemon*, 403 U.S. at 612-13.

In *Lynch v. Donnelly*, 465 U.S. 668, 688-693 (1984) (O'Connor, J., concurring), Justice O'Connor suggested that the second prong of the *Lemon* test, which looks to whether the challenged state action advances or inhibits religion, be formulated as an "endorsement test." Under this analysis, the challenged practice would be invalid if it has either the purpose or *effect* of communicating a message of government endorsement or disapproval of religion. *Id.* at 691-92.

Accordingly, in *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), this Court applied an endorsement test that "precludes government from conveying or *attempting to convey* a message that religion or a particular religious belief is favored or preferred," *id.* at 593, (internal quotations and citations omitted), or even "*appearing* to take a position on questions of religious belief." *Id.* at 594 (emphasis added, here and throughout this brief).

In reviewing the challenged school activities, this Court need look no further than the "endorsement" test. Respondents' immersion of students in the practices and tenets of Islam – but not those of any other religion – indubitably conveyed at least the appearance that "a particular religious belief is favored or preferred." *County of Allegheny*, 492 U.S. at 593. This is all the more so given the "impressionable youth" standard governing issues of state-sponsored religious endorsement in the classroom.

B. The impressionable youth standard.

The First Amendment mandates strict neutrality by state actors in the field of religion. *Gillette v. United States*, 401 U.S. 437, 452 (1971). Even "*subtle departures* from neutrality" are forbidden by the Establishment Clause. *Id.* at 452. Nowhere does this principle apply with greater force than in the public school classroom.

Where public schools filled with impressionable children are concerned, this Court has established a heightened level of scrutiny for state action alleged to violate this requirement of strict religious neutrality: "As we have observed before there are heightened concerns with protecting freedom of conscience from *subtle coercive pressure* in the elementary and secondary public schools." *Lee v. Weisman*, 505 U.S. 577, 592 (1992). The concept of "subtle coercive pressure" or "subtle and indirect pressure," *Lee*, 505 U.S. at 592-94, constitutes a separate and distinct test for Establishment Clause violations in the public school context.

This Court's "impressionable youth" standard was developed to address the salient fact that public school

students are, as this Court has observed, a captive audience:

> The State exerts great authority and coercive power through mandatory attendance requirements and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure. . . . *In no activity of the State is it more vital to keep out divisive forces than in its schools.*

Edwards v. Aguillard, 482 U.S. 578, 584 (1987).

Accordingly, this Court has noted repeatedly that even the *risk* of an Establishment Clause violation in public schools warrants injunctive relief – *without proof of any actual proselytization* by school authorities. *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 387 (1985) ("substantial risk" requires injunction), *overruled in part on other grounds*, *Agostini v. Felton*, 521 U.S. 203, 235 (1997); *Levitt v. Committee for Pub. Educ. & Religious Liberty*, 413 U.S. 472, 480 (1973) ("substantial risk"); *Meek v. Pittenger*, 421 U.S. 349, 369 (1975) ("potential").

The Ninth Circuit's one-paragraph unpublished opinion on the merits, which cites a lone and quite inapposite Ninth Circuit precedent, ducks the central issue in this case: Are the lower courts following a double standard for the application of this Court's Establishment Clause jurisprudence in the school cases? That is, are they applying the school cases to exclude only Christianity, but not other religions, from the classroom?

C. The district court's novel theory allowing "Islam Lite" in the classroom.

The Ninth Circuit's opinion asserts, without the least analysis, that "The Islam program activities were not 'overt religious exercises' that raise Establishment Clause concerns." App. 1. That naked conclusion ignores the entire record in this case. As the district court's own opinion conceded, the express aim of the challenged activities in the "interactive educational module" at Excelsior School, as stated in the Student Guide, was that "[f]rom the beginning [of this module], *you and your classmates will become Muslims.*" ER 2534.

This undisputed fact alone mandates reversal. An elementary school curriculum in which students are told that they will *become* Muslims – even for "demonstration" or "role-playing" purposes – cannot possibly survive First Amendment scrutiny under either the "subtle coercive pressure" or the "endorsement" test enunciated in *Lee* and *Allegheny*, especially given the heightened scrutiny required by the impressionable youth standard.

If respondents had introduced an "interactive educational module" whose aim was that "you and your classmates will become *Catholics*," outraged non-Catholic parents and a battalion of ACLU lawyers would have rushed to the district court and sought injunctive relief, and the Ninth Circuit would most certainly have affirmed a grant of injunctive relief. There is only one explanation, therefore, for the result here: a double standard of Establishment Clause analysis.

Confronted with an insuperable Establishment Clause problem, the district court tried to navigate around it by reasoning that the undeniably religious activities in which

the school had embroiled children were only "simulations of Islam activities that were similar to, but not actual elements of, the Islamic faith. . . . [T]hese approximations of Islamic behavior cannot be considered actual 'religious activity' . . . " App. 20. In other words, the district court found that since the "module" required students to practice a sort of "Islam Lite" – a slimmed-down version of Islam for classroom purposes – the whole exercise could pass constitutional muster. The Ninth Circuit has affirmed this preposterous idea, albeit in an unpublished opinion clearly designed to deflect this Court's review.

The Ninth Circuit's affirmance of the district court rests entirely on an inapposite citation to its own opinion in *Brown v. Woodland Joint Unified School District*, 27 F.3d 1373, 1378 (9th Cir. 1994). But *Brown* involved nothing more than students reading about and discussing witches and making up some magical spells. These "were merely fantasy activities . . . that happen to resemble religious practices" of the Wiccan religion. *Id.* at 1382. Furthermore, the plaintiffs in *Brown* conceded that the authors-editors of the reading material "were unfamiliar with the religion of witchcraft" and were not intending to promote it. *Id.* at 1377. The classroom activity at issue thus had a mere "*coincidental resemblance* to a religious practice." *Id.* at 1381.

This case, however, does not involve a merely coincidental resemblance to Muslim religious practices, but rather *the deliberate and explicit curricular goal* that "you and your classmates will *become Muslims*." As the Ninth Circuit recognized in *Brown*, "active participation in 'ritual' poses a greater risk of violating the Establishment

Clause than does merely reading, discussing or thinking about religious texts." *Brown*, 27 F. 3d at 1380.[2]

The Ninth Circuit has ignored its own advice in *Brown*. The challenged activities were not, as the district court opined, mere "simulations of Islam activities," but rather *partially performed* Islamic practices and *partially learned* Islamic teachings. The "interactive educational module" undeniably embroiled impressionable students in learning *some* of the prayers Muslims learn, making *some* of the sacrifices Muslims make during Ramadan, learning *some* of the religious truths Muslims are required to know, and dressing and being known by Muslim names *some* of the time. The result was not "simulated Islam" but rather *a dabbling in real Islam* that is constitutionally indefensible in the public school context. *See* Petition, 3-12.

The district court seems to have been under the impression that the defendants were free to promote parts of Islam in order to stimulate interest in other religions as part of "cultural education." But as this Court noted in *Ball*, classroom activity that "increases respect for" or "helps stimulate interest" in a particular religion transgresses the Establishment Clause, even without overt proselytizing by teachers. *Ball*, 473 U.S. at 391-92 (citing Gianella, "Religious Liberty, Nonestablishment and Doctrinal Development," 81 Harv. L. Rev. 513, 574 (1968)).

---

[2] In dicta, the *Brown* opinion suggested that having students reenact religious rituals such as the Last Supper or a Passover "*might* be permissible if presented for historical or cultural purposes." *Id.* at 1380. But this Court declined to reach the question, since the activities challenged in *Brown* were not explicitly religious. In this case, however, students were deliberately engaged in overtly religious activities in order to "become Muslims." No historical or cultural purpose could justify this immersion of students in the practices and tenets of Islam.

Moreover, it is crucial for application of the "endorsement" test that, as the district court itself conceded, no other religion was presented to Excelsior students in this "interactive" fashion. App. 20. The students were expected to "become" *only* Muslims. Thus, the Ninth Circuit has affirmed as religiously neutral an "educational" program in which impressionable youth in public school classrooms are required to partake of the tenets and practices of one – and only one – religion out of all the religions in the world. Yet there can be no question that the Ninth Circuit would have struck down an "interactive module" involving these Catholic analogues to the Islam "module":

- Take the confirmation name of a Catholic saint.
- Dress like a Catholic priest or nun.
- Wear nametags bearing the student's Catholic confirmation name and a crucifix bearing the Body of Christ.
- Memorize and repeat for the teacher the first verse of the Gospel of St. John: "In the beginning was the Word, and the Word was with God, and the Word was God," as well as other portions of the New Testament.
- Memorize the opening line of the Hail Mary – "Hail Mary, full of grace, the Lord is with Thee" – and repeat it for the teacher both in the classroom and upon exiting the classroom.
- Create banners stating "In the name of the Father, and of the Son, and of the Holy Ghost."

- Give up a lunch or engage in some other act of self-denial, and perform an act of charity, in keeping with a Catholic's Lenten obligations of fasting and almsgiving.
- Memorize religious sayings of Catholic saints, such as St. Augustine's "You have made us for yourself, and our hearts are restless until they rest in You."
- Make a virtual pilgrimage to Rome by playing a dice game and drawing cards containing Catholic teachings denominated as "truth" and "fact," such as: "The Holy Catholic Church was founded by Jesus Christ upon the Rock of Peter. **Fact.**"

When legal principles are applied inconsistently, law as such ceases to exist, and the courts become mere dispensers of *ad hoc* decisions tailored to the predilections of the day. The rule of law itself demands that the Ninth Circuit's double standard of Establishment Clause jurisprudence be corrected. Moreover, if this Court does not grant review, the jumble of *ad hoc* decisions in this area – motivated, it seems, by little more than the reigning political correctness – will continue to accumulate in the lower courts. There is no better vehicle than this case for the task of bringing consistency to the lower courts' application of this Court's Establishment Clause precedents in the school cases.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

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June 30, 2006

No. 05-1539

Supreme Court, U.S.
FILED
JUL 3 - 2006
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JONAS EKLUND, *et al.*,

Petitioners,

v.

BYRON UNION SCHOOL DISTRICT, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Establishment Clause is violated when a public elementary school has students adopt the persona of a member of a religion and act out religious activities and practices under the guise of cultural education?

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

Mountain States Legal Foundation ("MSLF") respectfully submits this *amicus curiae* brief in support of the Petitioners. Pursuant to Supreme Court Rule 37(2)(a), this *amicus curiae* brief is filed with the written consent of all the parties.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

MSLF is a non-profit, membership public interest legal foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited and ethical government, and the free enterprise system. MSLF's members include businesses and individuals who live and work in nearly every State of the country. Most of MSLF's members, however, live and work in the eleven States of the American West; as a result, for economic and recreational purposes, they must make use of the federal lands that predominate in the West.

For more than a decade, the ability of MSLF's members to engage in such economic and recreational pursuits has been constrained by decisions of federal land managers to accede to the demands of American Indian religious

[1] Copies of the consent letters have been filed with the Clerk of the Court. In compliance with Supreme Court Rule 37(6), MSLF represents that no counsel for any party authored this brief in whole or in part and that no person or entity, other than MSLF, made a monetary contribution to the preparation or submission of this brief.

practitioners that certain federal lands are sacred and must be closed to non-Indians. Consistently, MSLF has challenged those closures as a violation of the Establishment Clause, including in *Bear Lodge Multiple Use Ass'n v. Babbitt*, 175 F.3d 814 (10th Cir. 1999); *Rocky Mountain Oil and Gas Ass'n and Independent Petroleum Ass'n of America v. U.S. Forest Service*, 2001 WL 470022 (9th Cir. 2001); *Natural Bridge and Arch Society v. Alston*, 98 Fed. Appx. 711 (10th Cir. 2004); *Wyoming Sawmills, Inc. v. U.S. Forest Service*, 383 F.3d 1241 (10th Cir. 2004); and *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969 (9th Cir. 2004). Because of this interest in Establishment Clause jurisprudence, MSLF joins the Petitioners in requesting that *certiorari* be granted.

OPINIONS BELOW, JURISDICTION, AND STATEMENT OF THE CASE

Amicus hereby adopts Petitioners' description of the decisions below, statement of jurisdiction, and statement of the case. *See* Petition at 1-16.

SUMMARY OF THE ARGUMENT

This Court should grant *certiorari* in this case for two reasons. First, the Ninth Circuit implicitly decided an important federal question concerning the Establishment Clause in a way that conflicts with this Court's interpretation of the Establishment Clause. Specifically, the Byron Union School District, a public school district, compels students to participate in an Islamic role-play unit. This unit immerses students directly in religious exercises,

even if the exercises do not exactly emulate the tenets of Islam. Yet, the Ninth Circuit held that no Establishment Clause violation existed. This Court should grant *certiorari* to reverse that decision, which is in clear conflict with this Court's precedents that prohibit compelled religious exercises or compulsory religion generally.

Second, this Court should grant *certiorari* to clarify the status of Establishment Clause jurisprudence, an important federal question. The Byron Union School District's Islamic role-play unit teaches facts and beliefs of the religion of Islam. The Ninth Circuit implicitly held, however, that this lesson was cultural and historical and not religious. This Court should grant *certiorari* and conclude that government coercion regarding religion does not escape application of the Establishment Clause merely because the subject religion is intertwined with the history and culture of that religion and its adherents.

ARGUMENT IN SUPPORT OF PETITION

I. THIS COURT SHOULD REVIEW THE NINTH CIRCUIT'S DECISION BECAUSE IT CONFLICTS WITH THIS COURT'S INTERPRETATION OF THE ESTABLISHMENT CLAUSE.

A. The Byron Union School District Violated The First Amendment By Coercing Students To Participate In A Religious Exercise.

In *Lee v. Weisman*, 505 U.S. 577, 587 (1992), this Court declared, with regard to Establishment Clause claims in public schools: "[i]t is beyond dispute that, at a minimum, the Constitution guarantees that government

may not coerce anyone to support or participate in religion or its exercise. . . . "[2]

1. The students were coerced into engaging in the Islamic role-playing unit.

This Court has held that religious activities that are "held in [public] school buildings under the supervision and with the participation of teachers employed in those schools" violate the Establishment Clause. *School Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 223 (1963). Further, the ability to refrain from the religious activity does not negate the coercive effect of religion in public schools. *Engel v. Vitale*, 370 U.S. 421, 430-432 (1962) (holding that a prayer at the beginning of a school day violates the Establishment Clause even if students are permitted to remain silent or leave the classroom). This Court explained that "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure . . . is plain." *Id.* at 431. Likewise, the students in the Byron Union School District were coerced into engaging in the Islamic role-playing unit in spite of the purported ability to opt-out of the unit.

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[2] This Court has developed three related but distinct tests to evaluate Establishment Clause claims: the *Lemon* test, *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); the *Lynch* test, *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J. concurring); and the *Lee* test, *Lee*, 505 U.S. 577, 587. Only *Lee* applies in the context of alleged religious activity in a public school; therefore, *amicus* will only apply the *Lee* test.

2. The students were engaged in "religious exercises" even if those exercises did not satisfy each and every aspect of the Islamic religion.

The district court held, and the Ninth Circuit implicitly affirmed, that the students in the Byron Union School District did not perform any religious exercises. Instead, the court held that students participated in activities that, although analogous to Islamic religious practices, "were not actually the Islamic religious rites." Petition Appendix at 18-19. The children in the Byron Union School District adopted Muslim names, as Americans converting to Islam would, memorized and recited Muslim prayers to "analogize" religious worship, gave up a meal or snack to honor Ramadan, read from the Koran, and took a "pilgrimage" to Mecca. The district court compared these classroom activities to the practice of "devout Muslim practitioners" and concluded that anything less than the latter would not constitute a religious exercise. As such, the students' activities were merely "approximations" of the Islam religion. *Id.*

This holding and the Ninth Circuit's affirmance of it conflict directly with this Court's ruling in *Lee* where this Court held that an act constitutes a religious exercise if a reasonable person objectively could believe that the act signified participation or approval of the exercise. 505 U.S. at 593. In *Lee*, this Court held that a nonsectarian graduation prayer by a rabbi constituted a "religious exercise" because a reasonable person at the graduation could have believed that religion was being practiced. *Id.*

The district court's view that the activities in which the children were required to engage "were not actually the Islamic religious rites" is flawed. Even among

Muslims, there is no small disagreement as to what activities are true "Islamic religious rites" and what activities only "approximate" those rites. For example, Islamic law requires that Muslims pray five times a day facing Mecca. Petition Appendix at 18. Yet, many Muslims "approximate" this requirement and pray less often. *See* http://www.beliefnet.com/story/191/story_19198_1.html (last visited June 20, 2006) ("Not all Muslims follow their religion's rules on praying five times a day."). Nonetheless, a reasonable person would conclude that these Muslims participate in religious practices when they do pray.

Similarly, the Ahmadis read from the Koran, which they believe is the literal word of God, worship Mohammed as the messenger of God, take pilgrimages to Mecca, fast during Ramadan, and consider themselves devout Muslims. http://www.alislam.org/ (last visited June 21, 2006); *Sahi v. Gonzales*, 416 F.3d 587 (7th Cir. 2005). Yet, unlike other Muslims, they do not believe that Mohammed was the last prophet. *Id.* This has caused some Muslims to denounce the Ahmadis' Islamic ties. *Id.* Nonetheless, most objective observers would conclude that reading from the Koran, worshiping Mohammed, taking pilgrimages to Mecca, and fasting during Ramadan constitute actual religious activities – not mere approximations of religion. Likewise, the Byron Union School District's Islamic role-playing exercise objectively constituted a religious practice.

Assuming *arguendo* that the Eklunds did not participate in a "religious exercise," the Islamic role-playing unit, nonetheless, violates the First Amendment, as interpreted by this Court in *Lee*. The *Lee* test provides: "[t]he Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise. . . . "

Lee, 505 U.S. at 587. The phrase "religion or its exercise" is written in the disjunctive. Therefore, the test prohibits the coerced participation in religion in a general sense, or participation in religious exercises.

The Byron Union School District's role-playing unit encouraged the students to "become Muslim" and taught various aspects of the religion itself. The purpose of the unit was not to clarify a secular historical or cultural lesson through an explanation of religion but, instead, to teach about the religion for its own sake. *See* Section II, following. Thus, regardless of whether the role-playing unit constituted an actual practice of a religious exercise, it nevertheless unconstitutionally amounted to coerced support for religion generally.

B. This Court Should Grant *Certiorari* Because The Holding Of The Ninth Circuit Conflicts With Decisions Of This Court.

As this Court enunciated in *Lee*, governments may not "coerce anyone to support or participate in religion or its exercise." *Lee*, 505 U.S. at 587. The Byron Union School District's role-playing unit, in which students were told "you and your classmates will become Muslims," Petition Appendix at 7, and in which students actively engaged in Islamic rituals – albeit not to the extent of some devout Muslim practitioners – was objectively a religious exercise, or, at a minimum, religion, and the students were coerced into participating in the Islamic role-play unit. As a result, the holding by the district court, which was affirmed by the Ninth Circuit, is in direct conflict with this Court's holding in *Lee*. Therefore, this Court should grant *certiorari*.

II. THIS COURT SHOULD GRANT *CERTIORARI* TO DECIDE AN IMPORTANT FEDERAL QUESTION: WHETHER GOVERNMENT COERCION REGARDING RELIGION ESCAPES APPLICATION OF THE ESTABLISHMENT CLAUSE WHEN THE RELIGION IS INTERTWINED WITH THE HISTORY AND CULTURE OF THAT RELIGION AND ITS ADHERENTS.

The district court concluded, and the Ninth Circuit implicitly affirmed, that the Islamic role-playing unit was purely secular because it instructed students solely about the culture and history of Islam. Petition Appendix at 23-24.

This is not the first time that the Ninth Circuit has upheld government coercion regarding religion when religious faith is intertwined with history and culture. In *Cholla*, 382 F.3d 969, the Ninth Circuit concluded that federal protection of a site on private land regarded by some American Indian religious practitioners as sacred did not violate the Establishment Clause because, "protecting Native American shrines and other culturally-important sites has historical value for the nation as a whole. . . . " *Id.* at 977. Specifically, the Ninth Circuit ruled, "[T]he Establishment Clause does not bar the government from protecting an historically and culturally important site simply because the site's importance derives at least in part from its sacredness to certain groups." *Id.*

That is not, however, the approach taken by the Ninth Circuit in a case decided three months earlier involving the constitutionality of a Latin cross erected on federal land in the California desert to commemorate those who died in World War I. In that case, the Ninth Circuit ruled

that, despite the historical and cultural significance of the Latin cross, the cross remained a symbol of the Christian faith and had to be removed. *Buono v. Norton*, 371 F.3d 543, 548-550 (9th Cir. 2004).

With its decision in the instant case, the Ninth Circuit has demonstrated, once again, that it does not apply the Establishment Clause jurisprudence of this Court consistently. As to religions whose history and culture are intertwined with matters of religious faith, the Ninth Circuit has held explicitly (in *Cholla*) and implicitly (in *Eklund*) that no Establishment Clause violation occurs when the public is coerced by government into respecting the religious orthodoxies of those religions. These holdings are in conflict with the rulings of this Court.[3]

Moreover, the Ninth Circuit's holding here is in conflict with the facts of the case. The materials used by the Byron Union School District in its Islamic role-playing unit were titled, "Islam: A simulation of Islamic history and culture." Petition at 2. Yet the unit neither presented a secular history lesson, nor did it address a particular culture.

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[3] That Judeo-Christian religion is intertwined with its adherents' "history" and "culture" has not saved purported government endorsement of that religion, for example, in the case of displays of the Ten Commandments, from application of the Establishment Clause. *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, ___ U.S. ___, 125 S.Ct. 2722 (2005). "In one key respect, the way the story of the United States has been told for the past one hundred years is wrong. It has cut off one of the two wings by which the American Eagle flies, her compact with the God of the Jews – the God of Israel championed by the nation's first Protestants. . . . Believe that there is such a God or not – the founding generation did, and relied upon this belief. Their faith is an 'indispensable' part of their story." Michael Novak, *On Two Wings: Humble Faith and Common Sense at the American Founding* at 5 (Encounter Books 2002).

Islam is a religion; therefore, while the unit might have taught the history of Islam and its spread throughout the world, that is not what the unit taught. Instead, it taught the students to "become Muslims" by engaging in the "religious orthodoxy" of Islam. *Lee*, 505 U.S. at 592. Similarly, the role-play unit did not teach about culture. Islam is a religion; it is not a racial or cultural group such as "Arab" or "Persian."

Therefore, because the Islamic role-play unit in a public school was religious, regardless of its historical or cultural components, it violated the Establishment Clause. This Court should grant *certiorari* to reverse the decision of the Ninth Circuit and to clarify its Establishment Clause jurisprudence.

CONCLUSION

Mountain States Legal Foundation respectfully requests that this Court grant the Petition for Writ of *Certiorari*.

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